

CORPORAL PUNISHMENT :
UNDERSTANDING THE DEBATE IN CANADA

by

Heather McIntyre

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Department of Political Science
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Abstract

There has been considerable debate over whether corporal punishment against children should be prohibited in Canada. Various organizations, most notably the Canadian Foundation for Children, Youth and the Law, have argued that the Canadian Government should ban the use of corporal punishment by repealing the specific section of the *Canadian Criminal Code* that provides parents with a legal defence to use corporal punishment against their children; this provision is outlined in Section 43 of the *Criminal Code*. Recently, the Canadian Foundation for Children, Youth and the Law challenged the constitutionality of Section 43 before the Supreme Court of Canada. The organization claimed Section 43 is unconstitutional. It violates children's Charter rights, such as the right to security of a person (Section 7), the right to be protected from cruel and unusual treatment (Section 12), and denies children the same protection adults receive under the law. Both the Canadian government and the Supreme Court of Canada reject the Foundation's arguments. Examining the federal government and the judicial system's rationale for refusing to remove Section 43 of the Canadian *Criminal Code* discloses how the parent-child relationship is perceived. This thesis examines how the parent-child relationship is perceived by the Canadian government and the issues that arise from such a view. This examination is essential for the comprehension of why Canada's corporal punishment law was enacted and remains in effect today.

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INTRODUCTION

In many contemporary societies, parents are seen as being primarily responsible for raising and educating their children to become productive citizens, and state intervention is justified only when parents neglect their obligations. In this thesis, this view will be referred to as the liberal paradigm of the parent child relationship. Under the liberal paradigm, there is a perception that parents do not possess control over their children because they bear them. Instead the liberal paradigm acknowledges that parental authority is legitimate only if parents protect and provide for their offspring. Also, parental authority is temporary and terminates once the child is able to provide for him or herself.

Parental power is needed because children are vulnerable, weak and unable to care for themselves. Children lack the ability to reason that adults possess, thus denying them the rights and freedoms adults have. Therefore, the condition of childhood justifies parental authority. Although parents possess authority over their children, children possess certain rights, but they are not as extensive as adults'; such as the right to be cared for, respected and not subjected to harm.

Since under the liberal paradigm of the parent child relationship the parents are primarily responsible for raising and educating their children, to fulfill such obligations the state recognizes that the family needs privacy and autonomy from the state, and therefore does not interfere into the family unless parents fail to fulfill their obligations or expose their children to harm.

Issues arise from this liberal paradigm of the parent-child relationship. It acts as a framework for how certain laws and policies that pertain to the family are constructed,

most notably Canada's present law on corporal punishment. Examining the debate over prohibiting corporal punishment of children not only reveals that Canada's corporal punishment law is founded on this liberal paradigm of the parent-child relationship, but that controversial issues arise from such a view. The purpose of this thesis is to examine the issues that the liberal paradigm of the parent-child relationship poses by examining Canada's corporal punishment law. This examination is essential in order to understand why Canada's corporal punishment law was enacted and remains in effect.

Chapter one outlines the work of three political theorists: Thomas Hobbes, John Locke, and John Stuart Mill. Their work provides an in depth explanation of this liberal paradigm of the parent-child relationship. The first part of chapter two discusses why parents decide to have and care for their children. Although each theorist presents his own rationale for why parents decide to take on this responsibility, they share a common belief in regard to the parent-child relationship. The three political thinkers claim that the family is a private and autonomous institution in which parents are primarily responsible for raising and educating their children to become productive citizens. State intervention occurs only when parents fail to fulfill their obligations or abuse their authority.

Chapter one also begins to examine how the Canadian government endorses this liberal paradigm of the parent-child relationship when constructing laws and policies that pertain to the family. This is done through the examination of Canada's corporal punishment law, which is outlined in Section 43 of the *Canadian Criminal Code*. In short, Section 43 is a legal defence available to parents, teachers, and a person standing in the position of a parent to use force for corrective purposes as long as it is reasonable.

Chapter two examines the background of Section 43; it outlines its purpose,

necessity and effects. The chapter then discusses how judges determine if the legal defence applies to a specific case. For the defence to be granted, the force administered needs to be for corrective purposes and reasonable under the circumstances. At first, these criteria appears vague, but in making reference to various court cases, it becomes evident what the terms, corrective and reasonable force, actually mean. The information presented in this thesis is based on the examination of fifty court cases where parents were charged with assault against their child. In the cases, parents claimed their actions were for disciplinary reasons and relied on Section 43. Some parents were acquitted and others found guilty.

Next chapter two discusses the Canadian government's rationale for refusing to repeal Section 43. Examining the federal government's and the Supreme Court of Canada's response to arguments in favour of removing s.43 reveals that the primary reason is grounded in Canada's endorsement of the liberal paradigm of the parent-child relationship. Also, this chapter reveals the issues that the corporal punishment law poses, since it is based on the liberal paradigm, and how the federal government attempts to address such issues.

Chapter three, first, outlines the initiatives taken by other countries to address the issue of corporal punishment. Sweden is discussed in detail since it is often argued that Canada should adopt a similar approach. Sweden implements a collectivist approach when dealing with the family in contrast to Canada's liberal paradigm. Under the collectivist approach, both the state and family play an active role in raising and educating children. This chapter discusses certain policies and laws that are based on the collectivist approach: health care, parental leave and child care. The collectivist approach

is worth exploring. It has the potential to address key problems that the liberal paradigm of the parent-child relationship poses. The chapter concludes by examining why implementing Sweden's approach would be difficult for Canada. Although the Canadian government refuses to follow in the footsteps of other countries, it has decided to address the issue of corporal punishment through an educational approach rather than a legal one, which is the focus of Chapter four.

Chapter four begins by outlining the importance of education and why it appears to be an appropriate approach to employ. It also examines the educational programs supported by the Canadian government, such as the Nobody's Perfect and the Community Action Program for Children, and why these programs are beneficial to families. The chapter concludes in examining the weaknesses of the Canadian government's educational programs. Through this analysis, it is apparent that these programs, like S.43 of the *Criminal Code*, are based on the liberal paradigm of the parent-child relationship.

The conclusion provides an overall summary of the key issues discussed in the thesis. It also discusses the importance of the findings from the court cases examined and concludes by recommending where further research is needed.

CHAPTER ONE

POLITICAL THEORISTS AND CANADA'S PERCEPTION OF THE PARENT-CHILD RELATIONSHIP

When discussing how the parent-child relationship is perceived under the liberal paradigm, examining the work of three political thinkers- Thomas Hobbes, John Locke, and John Stuart Mill,- is essential. Although the theorists present their own rationale for why parents decide to have and care for their children, they share a fundamental view, one that has come to govern how many contemporary societies perceive the parent-child relationship. They claim that the parent-child relationship is private and different from others. Parents are primarily responsible for raising and educating their children to become productive citizens. State intervention occurs only when parents fail to fulfill their obligations or abuse their authority. This chapter outlines how the philosophers view the parent-child relationship. In turn, this examination makes it evident that the Canadian government endorses the same perception of the parent-child relationship when constructing its laws and policies.

Thomas Hobbes (1588-1679)

Thomas Hobbes rejects the notion that biological begetting of children establishes a parental right to dominate them, which was a commonly held view. Instead, a parent, chiefly the father, obtains this right by rescuing the child from the state of nature, which is depicted as a state of war; it is brutish, nasty and short lived. Hobbes provides two explanations for this. First, this right of authority emanates from the child's consent, whether conveyed or inferred. Secondly, if parental dominion is grounded on procreation that would imply both parents have control over their children since both play a vital role

in reproduction. Hobbes believes it is impossible for two beings to have governance over one person: "Dominion, or any form of authority, is meaningful, according to Hobbes, only when it is undivided".¹ Therefore, only one parent can have control over children in the family in civil society.

Although Hobbes thought authority over children usually falls to the father, this does not imply they have a natural right over their children, nor that women can not possess such power. Hobbes explicitly acknowledges mothers can have authority over children. In the state of nature, where civil authority is absent, maternal dominion is more prevalent. There are two reasons for this; both are related to women's reproductive capabilities. First, the father is uncertain whether the child born is his. Women do not lack such uncertainty since they carry and give birth to the child. Furthermore, the mother confirms who the biological father is. Thus, she is not only responsible for establishing the maternity but also the paternity of the child. If the woman desires to maintain authority over the child, she can:

For in the condition of meer Nature, where there are no Matrimoniall lawes, it cannot be known who is the father, unlesse it be declared by the Mother: and therefore the right of Dominion over the child dependeth on her will, and is consequently hers.²

A mother has command over her children. She normally has first access to them, considering she bears and gives birth. She decides if the child will be nourished or left to die, since a child is completely dependent on others for survival. Also, the mother has the option of leaving the child with others who are responsible for caring for the child.

Again, seeing the Infant is first in the power of the Mother, so as she may either nourish, or expose it, if she nourish it, it oweth its life to the Mother; and is

¹ Ingrid Makus, *Women, Politics, & Reproduction: The Liberal Legacy* (Toronto: University of Toronto, 1996), 15.

² Ibid., 16.

therefore obliged to obey her, rather than any other; and by consequence the Dominion over it is hers.³

By reviewing the possibilities available to mothers, it is evident Hobbes does not perceive parenting as natural, but based on rational choice; it is a voluntary action. So, why do women and men engage in this voluntary act?

For Hobbes, individuals-both males and females- do not undertake voluntary actions unless they benefit from them. It is suggested parents provide for their children only if it is believed they will be rewarded in the future. For example, in the state of nature, mothers provide nourishment to their offspring in the hope of securing an ally when the child is grown: “If therefore she breeds him (because the state of nature is the state of war) she is supposed to bring him up on this condition, that being grown to full age he becomes not her enemy; which is, that he obey her”.⁴ It appears parents’ justification in providing for their children is not motivated by natural instinct, but self-interest.

Although Hobbes spends time focussing on biological connections between children and parents, it is primarily used to reveal that women can have authority over their children. In fact, for Hobbes, biological ties have little significance in establishing parental control. This authority is given only to the individual who provides for the child: “The rightful parent is the one who first nourishes the child, thereby giving it life, rather than the one who begets it, which of itself does not ensure life”.⁵

Hobbes regards the parent-child relationship as private and different from other relations. He recognizes that children contrary to adults, lack the ability to reason during

³ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 17.

⁴ Ibid., 18.

⁵ Ibid., 19.

childhood. As a result, children are prevented from engaging in civil society. They are not at liberty to govern themselves freely or to have input into public affairs. Even though the parent-child relationship is private, the State takes measures to ensure that parents fulfill their obligation to provide for offspring. State interference occurs through the establishment of laws: Laws of Gratitude, Marriage and Education. This is because providing for children, which is a parental responsibility, serves a greater political end; the survival of the political community. Additionally, these statutes act as incentives for parents, since parenting is not natural but self-interested.

In the public realm, the State implements the Laws of Nature. The key Law of Nature that pertains to the family is the Law of Gratitude, which is the Fourth Law of Nature. This law specifies that individuals who acquire benefits from others are prohibited from behaving in a way that makes the benefactor regret doing good deeds. Thus, a child, when grown, is required to honour and respect the individual (s) who provided for him/her: “That a man which recieveth Benefit from another of meer Grace, Endeavour that he which giveth it, have no reasonable cause to repent him of his good will”.⁶

The Gratitude Law is an incentive offered to parents. There is no guarantee a child will automatically respect and honour his or her parents when an adult. However, since this law requires children, when grown, to take actions that do not counter parents’ goodwill, it ensures they will be repaid in the form that promotes their self-interest.

Formation of marriage laws is another means for ensuring that children are provided for. Marriage is based on a contract between men and women. In a family, only one person can have dominion over others. Therefore, if the couple produces children,

⁶ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 24.

one parent obtains that control. As previously mentioned, this power can be granted to either the female or male, but in civil society it is given to the father. When women enter marriage, they relinquish dominion over their children to the father. Mothers agree on the condition the father supports the family. This principle is based on custom; it is not natural. According to Hobbes, “Commonwealths having been erected by the fathers, not by the mothers of families, it is normally the case that the father or the master is the sovereign”⁷.

Despite the fact that the parent-child relationship is subjected to state intervention, that intervention is minimum. Fathers are given extensive authority over their children and exercise it as they see fit. This, in turn, motivates fathers to provide for their children. The family is free from state intervention when raising children on the condition parents provide for them, and their authority does not come into conflict with the state’s authority and goals, which includes to maintain peace in society and continuation of the political community.

Educational Laws are the final mechanism the State employs to ensure that parents provide and care for their children. These laws require parents to educate their children to become law abiding citizens, similar to adults.

Two factors motivating adults to enter, maintain and uphold civil society are self-interest and fear. Both demand the exercise of reason. Since children lack reason, another method must be employed to ensure that children obey laws. That means is education. Education is not to be used to create moral beings nor to enlighten individuals, but to produce children fit for society. It instills in them how to conform with social norms and

⁷ Richard W. Krouse, *Patriarchal Liberalism and Beyond : From John Stuart Mill to Harriet Taylor*, Edited by Jean Bethke Elshtain, *The Family in Political Thought* (Amherst: University of Massachusetts Press, 1982), 154.

laws, which create obedient citizens. Education serves a political end. For a political community to remain stable and flourish, individuals need to comply with authority as well as society's laws.

Parents, under the Laws of Education, are mandated to educate their children. To guarantee that this duty is executed, the State offers fathers another incentive. In return for educating children, fathers have the ability and are required to teach children that they possess a natural absolute right over them. This makes it easier to elicit honour and obedience from their children. Thus, there is a greater assurance that parents benefit from raising and providing for their children.

John Locke (1632-1704)

Similar to Hobbes, Locke discredits parenting as natural. Parents do not have a natural instinct nor desire to have children. Procreation is a by-product of satisfying sexual desires. God is responsible for the act of conception, which often occurs against parental wishes and without their knowledge. Since procreation is usually a result of divine intervention rather than choice, why would parents care for their children? Locke proclaims that providing for one's children is a God-given duty. "After Adam and Eve, all Parents were, by the Law of Nature, under an obligation to preserve, nourish, and educate the children, they had begotten, not as their own Workmanship, but the Workmanship of their own Maker, the Almighty, to whom they were to be accountable for them".⁸

Akin to Hobbes, Locke reckons that children lack the ability to reason that adults exhibit. Locke is an empiricist. Human knowledge is accumulated through experience; it

⁸ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 74.

is not inborn. However, Locke does not think children's minds are completely empty. Children are born with reason, but experience gives them the ability to use it. Children are viewed as citizens in the making.⁹

Due to children's lack of ability to reason, they are weak and vulnerable. They do not possess the freedom to exercise rights, nor the ability to provide for themselves; therefore, parents need to exercise authority over them. Parental power is obtained and legitimate only if parents provide for children. According to Locke, "a parent's power does not belong to the Father by any peculiar right of Nature, but only as he is a guardian".¹⁰ In providing for children, parents are not only required to supply life's basic necessities, but all comforts they can afford. This is evident in the fact, Locke gives parents the right to accumulate excess property; this equips children with life's conveniences, and ensures that they are provided for if the parent dies.

Parents' domination over their children is temporary and proportional to the degree of reasoning the child possesses. Control is terminated when children reach the state of adulthood. For Locke, adulthood is not a particular age, but a state of mind. During adulthood, one has the ability to use reason, understand, obey laws, and acknowledge that liberty is not a licence to do as one pleases. According to Locke, the state of adulthood is one

wherein he might be suppos'd capable to know that Law, that so he might keep his Actions within the Bounds of it. When he has acquired that state, he is presumed to know how far that Law is to be his Guide, and how far he may make use of his Freedom, and so comes to have it; till then, some Body else must guide him, who is presumed to know how far the Law allows a Liberty¹¹

Reaching adulthood means individuals are now at liberty to consent or not to

⁹ David Archard, *Children: Rights & Childhood* (London: Routledge, 1993), 6.

¹⁰ Ibid., 8.

¹¹ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 73.

consent to the government in power. State authority is concerned with this issue; such liberty has the potential to threaten the continuity and stability of the political community. The State relies on two mechanisms for ensuring that individuals comply with State rules and regulations: the accumulation of parental property and education.

Accumulation of parental property serves as an incentive for getting individuals to consent to the government and its laws. Children can enjoy their parent's property only if they agree to abide by the laws and rules of their parent's government.

the Son cannot ordinarily enjoy the Possessions of his Father, but under the same terms his Father did; by becoming a Member of the Society: whereby he puts himself presently under the Government, he finds there established, as much as any other Subject of that Commonwealth.¹²

Assurance of acquiring parental property not only aids in eliciting children's compliance to parental wishes, but the State's as well. Denial or relinquishing of parental property acts only as a temporary means for affirming compliance with the law. Once children obtain the age of reason, the property is theirs to dispose of as they see fit; this includes the property inherited from parents. Consequently, there is no longer an incentive to abide by parent's wishes nor State Authority: "Indeed, Fear of having a scanty Portion if they displease you, may make them Slaves to your Estate, but they will be never the less ill and wicked in private; and that Restraint will not last always"¹³. Furthermore, the accumulation of parental property is not the preferable means for ensuring compliance. Once individuals renounce their property, they are at liberty to go and join another Commonwealth or come together with others to create a new one. The obtainment of parental property does not serve as a means for making permanent, full-fledged citizens, but temporary ones only.

¹² Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 72.

¹³ Ibid., 72.

Education is noted as the best instrument for ensuring that children become permanent law-abiding citizens as adults. It equips individuals with the ability to reason; that enables them to limit liberties appropriately. Locke states, “education creates adults who are willing and able to oblige themselves to the laws of civil society”.¹⁴ The onus of education falls to parents; extensive power over children is necessary to be successful. Producing obedient beings is difficult, especially since children usually possess certain desires. Firstly, there is a desire to love liberty, or to do as one pleases. This desire must be curbed by parental law. Secondly, the love of dominion over others. Children aspire to follow their own will rather than parents’. This must be constrained by punishing children for non-compliance and forbidding them to torment others. Finally, the desire for one’s own possessions must be controlled. These ambitions are to be controlled, but not eliminated. Instead, parents need to teach children to use them effectively.

Parents have a wide range of authority over their children. Including “the power to command them, chastise them, and elicit absolute obedience from them”¹⁵. Parents possess the authority to use physical discipline when correcting children; however, it is not promoted. (As a general rule, Locke believes physical punishment should never be used. It promotes violence and does not teach children why the behaviour is forbidden.¹⁶ However, exceptions are made when dealing with obstinate behaviour. According to Locke, “non-compliance is the one fault for which children must be beaten”.¹⁷)

Granting extensive power to parents does not imply it is unlimited. The power of life or death over children does not fall to parents, and this authority is only temporary. It

¹⁴ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 73.

¹⁵ Ibid., 75.

¹⁶ Archard, *Children : Rights & Childhood*, 5.

¹⁷ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 58.

is terminated when children reach the age of reason. In exchange of providing for children, parents receive a life time of honour and respect, which is equivalent to the amount of care provided to the offspring.

According to Locke, the appropriate approach that should be implemented when educating children is to socialize them to societal norms: “teaching children the value of social reputation by instilling in them the desire for the esteem of others”.¹⁸ Children lack the reason to understand why they should obey laws, but understand whether they have parents’ approval. Parents should reward their children for good behaviour by praising them, and discard bad behaviour by acting coldly towards them. From this, children learn what is expected of them.

John Stuart Mill (1806-1873)

In contrast to the other two theorists, Mill portrays parenting as natural in the sense that women have a innate inclination to bear and rear children. He postulates that when given an equal opportunity to participate in public life, such as through outside employment, the majority of women would choose marriage and motherhood.¹⁹

Women’s tendencies and capabilities are important factors in why they have a natural propensity to care for children. Their mental faculties are such that females are more incline to engage in practical reasoning, which means being instinctive and preoccupied with present issues. Women are generally better at applying the thoughts and ideas of others: “Women are more talented in applying general laws to individual cases than in coming up with scientific laws or moral principles. In contrast, men’s mental

¹⁸ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 58.

¹⁹ Ibid., 93-126.

faculties incline them to speculative reasoning, which is more amenable to the creation of general principles”²⁰. Women’s preoccupation with present issues enables them to be more concerned with private affairs, such as the family, over public ones: “ Exercising and acquiring practical reason and knowledge are compatible with a focus on immediate, practical and private concerns, whereas exercising and acquiring speculative reason and knowledge, more prevalent in men, is comparable with a focus on long-term, general, public concerns ”.²¹

Simultaneously, Mill asserts that women affiliate their self-interest with others, such as husbands and children. They are more likely than men to sacrifice their own needs and desires for the welfare of others. Subsequently, women are more inclined to care of others. However, Mill does not believe self-sacrificing pertains to women only:

If women are better than men in anything, it surely is in individual self-sacrifice for those of their own family. But I lay little stress on this, so long as they are universally taught that they are born and created for self-sacrifice. I believe that equality of rights would abate the exaggerated self abnegation which is the present artificial ideal of feminine character, and that good women would not be more self-sacrificing than the best man: but on the other hand, men would be much more unselfish and self-sacrificing than at present, because they would no longer be taught to worship their own will as such a grand thing that it is actually the law for another rational being²².

Mill conceives parents have certain responsibilities to their children, which consist of caring, providing and educating them. Coinciding with Locke and Hobbes, Mill agrees parents need sufficient authority over their children, and it is conditional and legitimate only if parents fulfill their obligations. If parents fail, State intervention occurs. Parental duties not only affect the family, but more importantly the well-being of society.

First and most eminently parents must educate their children. For Mill, education

²⁰ Makus, *Women, Politics, & Reproduction: The Liberal Legacy* , 98.

²¹ Ibid., 102.

²² Ibid., 103.

has three objectives; all serve the greater good of society. It teaches individuals to conform to social norms and ingrains that one's self interest is associated to others: "a feeling of unity with all the rest; which feeling if perfect would make him never think of, or desire, any beneficial condition for himself, in the benefits of which they are not included"²³. This guarantees that all actions are taken in society's best interest.

Education, furthermore, enlightens individuals, but only applies to beings who possess great mental capabilities. These individuals are more publicly minded. They are more inclined to know what is in society's best interest than the majority of citizens, and not easily swayed by public opinion. For those few individuals, "education takes the form of enlightenment, encouraging them to challenge societal norms, to be creative, original, and to rise above the mediocre masses"²⁴. This is important; it leads to advances in civilization. Finally, education is used to train individuals to perform duties and work in certain occupations in society.

Mill regards the family as a "school of moral cultivation". Within the family setting, individuals learn to become citizens. They learn to interact with others first in this setting and then apply it to the outside world. Hence, the family prepares individuals for the public sphere.

Society's greater good rests on education. Therefore, Mill thought State interference was justified, if families neglected to educate children.

It still remains unrecognised, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfill this obligation, the State ought to see it fulfilled, at the charge, as far as possible, of the parent²⁵.

²³ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 105.

²⁴ Ibid., 105.

²⁵ Ibid., 109.

Mill assumes children's economic well-being is the parents' responsibility. When deciding whether or not to have children, couples must consider if their economic resources can provide for them. This view is re-enforced in Mill's belief that the State is justified and should prevent men and women from marrying if they lack the resources to provide for children.²⁶ Regulations are imposed. Failure to provide for one's children could pose negative effects on society- the financial burden of providing for these children.

Comparable to Locke, Mill discusses the use of physical force against children. He feels fathers are more likely to administer force against their children than mothers, and this is an inappropriate action for parents to employ. (Using physical force only teaches children that force is the means to resolve disputes, and how one controls their children: "Children who are witnesses to the tyranny of physical force in its coarsest manifestations' grow up to be incapable in their turn of governing their children by any other means than blows".²⁷ Mill calls upon the State to develop and implement harsh penalties against parents who use physical force on children. Mill believes parents should employ education instead of force when teaching their children to become productive citizens. Since fathers are more inclined to abuse their power and exert physical force, Mill believes mothers should possess greater rights over their children.)

The theorists propose their own rationales regarding why parents care for their offspring. Hobbes believed parents are motivated by self-interest. Parents provide for their children if it is believed that they will benefit from such actions in the future. Locke,

²⁶ Makus, *Women, Politics, & Reproduction: The Liberal Legacy*, 107.

²⁷ Ibid., 110.

however, believed that parents are obligated to provide for their children. It is their God-given duty. Mill, on the other hand, was the only one to view parenting as natural in the sense that women have an innate inclination to bear and raise children. Regardless, the thinkers shared a common belief. (They concluded education is the means for producing law-abiding citizens, not the use of physical discipline. Physical punishment is regarded as an inappropriate method of discipline; it only promotes violence and does not teach children why such behaviour is forbidden.)

The theorists believed education awakens children's reasoning abilities and instills in them how and why to conform with social norms and laws. They claimed that children, although they possess reason, lack the ability to reason that adults exhibit. This makes children vulnerable and weak. It denies them the rights and freedoms adults possess, and more importantly the ability to provide for and govern themselves.

According to the theorists education is a parental responsibility. Educating children is difficult since children possess certain desires, which were mentioned by Locke: the desire to do as one pleases and to dominate others (To be successful, parents need extensive control over their children. Therefore, as Locke stated, parents have the authority to use physical punishment when correcting their children, although it is not encouraged. The authority parents have over their children is justified only if they provide for them and do not abuse their power. Parental dominion is temporary and terminates when children reach the state of adulthood, which is not necessarily a particular age but a state of mind.) Adulthood is a state where one possesses the ability to use reason, abide by laws and recognizes that one's liberty is not a licence to act as one pleases. If parents neglect their obligations, the state will intervene. This intervention is

justified. Educating children serves the greater good of society. Education teaches children how to control their desires, interact with others, and to act according to social and legal norms. In turn, this leads to the stability and well being of society.

Canada's Perception of the Parent-Child Relationship

Examining the obligations these political philosophers place on parents reveals how the parent-child relationship is perceived in many contemporary societies (The parent-child relationship is a private one in which parents are primarily responsible for raising, providing and educating their children) State intervention is justified only when parents neglect their duties or if the parent's actions threaten State authority and goals, which is to continue the stability and security of the political community. Therefore, parents have the autonomy to raise their children as they see fit. Analyzing the Canadian Government's laws and policies that pertain to families, illustrates that Canadian society endorses this liberal paradigm of the parent-child relationship (The Canadian Government views the family as a fundamental structure. Through this unit, children receive life's education on how to become productive members of society.²⁸ The Federal Government presumes that parents are responsible for raising, protecting, maintaining and educating their children. The Canadian Government recognizes that parents need considerable leeway and authority over their children to fulfill such duties. However, this power is not unlimited and is only legitimate if parents carry out their obligations.)

Like the theorists, the Canadian Government recognize children are dependent on their parents during childhood. Children lack the capacities and capabilities adults have,

²⁸ *Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada* [2003], Factum of the Respondent Attorney General of Canada, 17.

such as the ability to reason.²⁹ This deficiency distinguishes the period of childhood from adulthood, and displays its uniqueness in the human life span. Every individual passes through this stage; it is unavoidable. As children progress through life, they gradually relinquish childhood privileges, take on adult responsibilities and finally are rewarded with self-determination when reaching the state of adulthood.³⁰

Children's deficiencies instill upon parents a social, moral, and legal duty to provide for their welfare. Children bear no such responsibility to their parents. Instead, they are obligated to comply with parental rules. (Parental responsibility is based on the assumption parents act in the best interest of their children. They are in a better position to make important decisions regarding their children, not the state: "The important corollary is that the state is ill equipped to make such decisions")³¹

Moreover, the Canadian government argues the State should intervene in family affairs only if parents fail to fulfill their duties and place children at risk of harm. This view is explicitly exerted in various laws that pertain to the family, most notably in Canada's corporal punishment law.

(Canada's corporal punishment law, outlined under Section 43 of the *Criminal Code*, permits parents to use physical punishment when disciplining their children.) According to the Canadian government "the implicit legislative objective of Section 43 remains to permit parents and teachers to carry out their important responsibilities to train and nurture children without the harm that criminal sanctions would bring to them, their

²⁹ *Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada* [2003], Factum of the Respondent Attorney General of Canada, 17.

³⁰ *Ibid.*, 17.

³¹ *Ibid.*, 24.

tasks and their families”.³² The federal government believes that when fulfilling these responsibilities parents should be free to use mild to moderate forms of physical punishment, such as spanking, to discipline their child. Section 43, however, operates within a limited context. The defence applies only in cases where reasonable force is used for corrective purposes, and by a selected group of people, such as parents and teachers.³³

The Canadian Government, like the theorists, does not support the use of physical force when educating children and advocates alternatives. It assumes the best means to teach children about appropriate behaviour, which in turns produces law-abiding citizens, is education. (This view is evident in various policies and programs the Federal Government supports. One program, NOBODY’S PERFECT, provides advice to parents on how to discipline their children without using physical punishment. A resource used in the program, called Behaviour, explicitly tells parents not to wait until children do something wrong; reward them for good behaviour. This way children learn what is expected from them: “If you only pay attention to your kids when they do something wrong, they will learn to misbehave to get your attention”.³⁴ Also, it recommends ignoring irritating behaviour: “Some things that kids do, like whining or interrupting, can drive you crazy. If your child gets attention for doing these kinds of things, he will keep it up. Irritating behaviour is best ignored”.³⁵ This guide also states that parents should use time outs, which is a disciplinary technique that requires the child to remain in a specific area for a certain amount of time, for example five to ten minutes. Other

³² *Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada* [2003], Factum of the Respondent Attorney General of Canada, 4.

³³ Ibid., 39.

³⁴ Health Canada, *Behaviour* (Ottawa: Minister of Public Works and Government Services Canada, 1997), 10.

³⁵ Ibid., 11.

recommendations include discussing incidents with children, removing the child gently when immediate threats occurs, and setting good examples. Physical force is not encouraged; it only teaches children that it is acceptable to hit others. Interestingly, these ideas are very similar to the theorists. Locke and Mill claimed physical punishment only promotes violence and does not teach children why the behaviour is prohibited.

Although the Canadian Government does not support the use of corporal punishment against children, it fails to believe parents should be subjected to criminal sanctions for using mild discipline, which is not harmful nor abusive, when educating their children. Section 43 allows parents to use mild force against their children if for corrective purposes. This defence assists parents in educating their children by providing reasonable lee-way to carry out their responsibilities. This section is needed according to the Canadian Government. It claims the definition of assault under the *Canadian Criminal Code* is extremely broad, compared to the definitions used in other countries³⁶: “Assault is the intentional application of force to another person, directly or indirectly, without the consent of that person”³⁷. Therefore, without Section 43, mild physical force, which is not harmful could result in criminal sanctions, thus leading to unnecessary state intervention into the family. According to the Federal Government, “simply removing s.43 from the Criminal Code would render all parents liable to criminal sanctions for all unwanted physical contact with their children in day-to-day fulfilment of their parental responsibilities to educate and care for their children”³⁸. This, in turn, could result in unnecessary state intervention, which will likely cause more harm than good to

³⁶ *Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada* [2003], Factum of the Respondent Attorney General of Canada, 20.

³⁷ Ibid., 20.

³⁸ Ibid., 37.

children³⁹.

From examining the Federal Government's position on the law of corporal punishment and the work of liberal theorists, it is apparent that the parent-child relationship is different from all other human relationships. The principles of liberalism, which includes the ability to govern oneself, and the establishment of authority upon consent⁴⁰, do not fully apply to children nor can they. Children can not enter into their biological family upon free consent. They are born into it; it is not through their own doing.⁴¹ Also, children can not act as autonomous and equal beings. They lack the same abilities as adults; capabilities that allow them to act independently. To act as autonomous beings, they need to acquire certain skills, such as reason, to become law-abiding citizens. Parents are responsible for helping children obtain these skills.

The Canadian Government and theorists support this view that the parent-child relationship is private and different from others. Their rationale is that it serves a greater political end; the assurance of a well-ordered society. If children are not educated on how to become productive citizens, this would have negative effects on the survival and flourishing of society. (Children must be educated on social norms and values, so when venturing into the public realm they behave accordingly. The family provides this education. To ensure political stability and continuity, the Canadian government recognizes that parents need authority over their children, and that Section 43 of the Criminal Code needs to be retained. The Federal Government noted,)

³⁹ *Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada* [2003], Factum of the Respondent Attorney General of Canada, 22.

⁴⁰ Archard, *Children: Rights and Childhood*, 110-121.

⁴¹ Jean Bethke Elshtain, *Power Trips and Other Journeys: Essays in Feminism as Civic Discourse* (Wisconsin, University of Wisconsin, 1990), 50.

Supporting parent's responsibilities to maintain and educate their children and providing some leeway for parents to carry out their important societal responsibility is a pressing and substantial objective.⁴²

The Canadian government endorses this liberal paradigm of the parent-child relationship. However, such a paradigm evokes concerns and problems. First, since parents are viewed as being primarily responsible for raising and educating their children, they are granted extensive control over their children and left to raise them as seen fit. There is an assumption that parents always act in the best interest of their children. In fact, child abuse is a crucial issue in Canadian society; thus it is apparent that parents do not always take actions that benefit their children. Also, since state intervention occurs only after parents violate their obligations, the system is reactive. This raises issues. Parental actions, such as physical abuse, can have devastating effects on children, such as depression, injuries, anti-social behaviour, psychiatric disorders or even death.⁴³ Also, examining the court cases demonstrate that parents do not always act in the child's best interest, nor are they aware how to. In various cases, parents claimed alternatives were attempted; they failed, so physical punishment was resorted to. As a result, some children were subjected to extensive bruises and injuries.

Also, there is the fact that this liberal paradigm of the parent-child relationship is in conflict with some of the core principles of liberalism. Societies grounded on liberal principles are committed to equality, individual autonomy and the establishment of authority through consent. According to Hobbes and Locke, "both insist upon the consent of naturally free and equal individuals as the sole legitimate basis for political or social

⁴² Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada [2003], Factum of the Respondent Attorney General of Canada, 36.

⁴³ Katherine Covell & Brian Howe, *The Challenge of Children's Rights for Canada* (Waterloo: Wilfrid Laurier University Press, 2001).

authority”.⁴⁴ In regards to the parent-child relationship and the law on corporal punishment, this is not the case. Both are founded upon a hierarchy; where parents execute extensive authority over their children without consent, nor are children seen as equals or autonomous beings. Many critics of Section 43, such as the Canadian Foundation for Children, Youth and the Law, claim it not only sends the message that children are second class citizens but treats them as such. This view was expressed by one of the judges in the Supreme Court of Canada’s ruling on the constitutionality of Section 43, which was delivered on January 30, 2004. According to Justice Binnie, who dissented from the majority in part, “to deny protection against physical force to children at the hands of their parents and teachers is not only disrespectful of a child’s dignity but turns the child, for the purpose of the *Criminal Code*, into a second class citizen”.⁴⁵ There is truth to this claim. Children are the only group of citizens who can be legally subjected to force: “Section 43 permits conduct towards children that would be criminal in the case of adult victims”⁴⁶. Another dissenting judge, Justice Deschamps, went further and stated that Section 43 implies children are property. Deschamps stated, “s.43 perpetuates the notion of children as property rather than human beings and sends the message that their bodily integrity and physical security is to be sacrificed to the will of their parents, however misguided”⁴⁷.

Examining Canada’s present law on corporal punishment provides a clearer understanding of the issues this liberal paradigm of the parent-child relationship poses.

⁴⁴ Richard W. Krouse, *Patriarchal Liberalism and Beyond : From John Stuart Mill to Harriet Taylor*, 153.

⁴⁵ *Canadian Foundation for Children, Youth and the Law v. Canada* (Attorney General) , 2004 SCC 4 para 109.

⁴⁶ *Ibid.*, para 50.

⁴⁷ *Ibid.*, para 232.

CHAPTER TWO

CANADA'S CORPORAL PUNISHMENT LAW AND RATIONALE

Considerable debate regarding whether or not corporal punishment against children should be prohibited in Canada is now taking place. Various organizations, such as the Repeal 43 Committee and the Canadian Foundation for Children, Youth and the Law, have argued that the Canadian government should prohibit corporal punishment by removing the specific section of the Canadian Criminal Code that provides parents with a legal defence to use corporal punishment against their children. This chapter examines the purpose of Section 43 and the Canadian government and the judicial system's rationale for refusing to repeal Section 43. Such an analysis reveals that the underlying reason for failing to prohibit corporal punishment is society's endorsement of the liberal paradigm of the parent-child relationship.

Background on Section 43 of the Canadian Criminal Code

In 1892, the Canadian government enacted the *Criminal Code*, which dealt with the issue of using corporal punishment against children. Section 43 of the *Canadian Criminal Code* offers parents, teachers and persons standing in the position of a parent the authority to use force when correcting their child, pupil, or who they are caring for, as long as the force is reasonable under the circumstances. Section 43 reads, "every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances".¹

¹ Criminal Code, R.S.C. 1985, c. C-46, s.43 .

The rationale for Section 43 was recently outlined by Justice McCombs in the Ontario Superior Court's ruling upholding the Constitutionality of Section 43, which took place in 2000. In this case, the Canadian Foundation for Children, Youth and the Law, argued that Section 43 is unlawful because it invades the rights of children, which are outlined in Section 7, 12, 15 of the Canadian Charter of Rights and Freedoms, and therefore, should be cancelled. In this judgement, the Superior Court acknowledges the purpose of Section 43. Section 43 recognizes that when raising and educating children, parents and teachers need reasonable latitude. Section 43 provides a protective sphere of authority for parents to fulfill their child-rearing practices and responsibilities by offering a defence for the use of physical force when disciplining children. Although this defence is available, the federal government and the Canadian judicial system believe that Section 43 protects children from abuse since the physical force permitted can only be administered for corrective purposes and can only result in non-abusive physical punishment.²

The legal defence Section 43 provides to parents is considered necessary because under the *Canadian Criminal Code*, the definition of assault is broad. Section 265 .1(a) of the Criminal Code defines assault as force that is intentionally applied to another individual, directly or indirectly, without the consent of that person.³ Since the definition of assault is broad, without Section 43, any mild or moderate form of physical discipline, including spanking, would be considered a criminal offence, thus leading to the

² Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General), (2001), 161 C.C.C. (3d) 178 .

³ Criminal Code, R.S.C. 1985, c. C-46 , s.265.

prosecution of parents⁴. This view was recently expressed by Canada's Chief Justice, Beverley McLachlin, who wrote for the majority: "The reality is that without s.43, Canada's broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute time out".⁵

In addition, the federal government noted that outside the parental context disciplinary techniques known as time outs (and variations which consist of isolating the child) will usually meet all factors of the offence of forcible confinement, which is outlined in Section 279(2) of the *Canadian Criminal Code*.⁶ These techniques are widely accepted, encouraged and used by parents when disciplining their children. Experts on both sides of the debate during the Ontario Superior Court ruling on the Constitutionality of Section 43 "all endorsed the time out method as an effective and appropriate method of child discipline".⁷ Also, some of these experts agree that only abusive physical punishment should be criminalized, not every instance of physical punishment administered by parents. Prosecuting parents for non-abusive physical punishment, such as spanking, is not desirable. This would result in the state intervening into the family life, which places stresses on the family.⁸

The effects of Section 43 were outlined in *Ogg-Moss v. R* (1984) by the Supreme Court of Canada. In this case, a residential care worker was charged with assault for

⁴ Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General), (2001), 161 C.C.C. (3d) 178 para. 23.

⁵ Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General), 2004 SCC 4 para. 62.

⁶ Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada [2003], Factum of the Respondent Attorney General of Canada, 6.

⁷ Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2000] 146 C.C.C. (3d) 362, para 17(a8).

⁸ Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada [2003], Factum of the Respondent Attorney General of Canada 6.

hitting a mentally challenged 21 year old patient five times on the forehead. The accused was found guilty after the court ruled Section 43 was not applicable to the case. The accused did not fall under the category of individuals who were granted the legal defence to use physical force when correcting children. The court's ruling was significant because it outlined Section 43 effects. Since Section 43 excuses a certain group of individuals from using physical force which would otherwise constitute a criminal offence, it removes from another group of people the protection of the criminal law.⁹

Since the *Criminal Code* grants parents this defence, it can be inferred that parents do not have an automatic right to use physical force against their child. As with any legal defence, the Canadian judicial system is responsible for determining if Section 43 is applicable to a certain case brought before the court. A case appears before the court after a parent has been charged with assault or assault causing bodily harm against their child. Charges are laid after children, especially older ones, report the incident to the police, teacher, school counsellor, social worker, or neighbour.

Determining if Section 43 applies to a case can be difficult. The language of the section is general and does not outline explicitly what corrective action is nor what type of action exceeds reasonable force. Over the years, courts, through case law, have established guidelines for determining what constitutes corrective purpose and what is unreasonable force. For the most part, judges rely on these guidelines, thus ensuring children are protected from abuse.

Since force, under Section 43, is used by parents for corrective purposes, it must be applied to benefit the child. Force can not be motivated by arbitrariness, caprice, anger or never be administered with the intention of inflicting physical injury on the child. The

⁹ Ogg-Moss v. The Queen, [1984] 2 S.C.R. 173 p. 183 .

judicial system acknowledges that anger may be present but can not be the motivating factor. This issue of parents being angry when administering force was dealt with in *R. v. Peterson* (1995). In that case, the father spanked his five year old daughter on the bare buttocks with the palm of his hand numerous times in a public setting for slamming her two year old brother's fingers in the car door. The prosecutor argued that the force was not for corrective purpose but meted out of anger. The judge responded, "it is unrealistic to assume that parents discipline their children, whatever the nature of the infraction, in a state of detached calm. Anger is part and parcel of correction of a child".¹⁰ The judge went on to say that the real issue is not whether the father was angry or upset, but if he was in control of his emotions. In the *Peterson* case, the judge truly believed the force was used for corrective purpose and the accused was in control of his emotions when the force was employed. The father was acquitted.

Meanwhile, if force is administered out of pure anger and not to educate the child, the parent will be found guilty of assault against the child. For example, in *R. v. B.R.* (2000), a father was found guilty of assaulting his eleven year old son. He struck his son on the buttocks with a belt two or three times for stealing a candy bar, causing a rectangular bruise on the boy's upper thigh. The boy continuously stole things, such as candy bars, money and videos. The force inflicted on the son was viewed as excessive since it exceeded previous discipline measures. Also, the court believed the father acted more out of frustration and anger than for corrective purposes. According to the judge, "I find a significant element of lack of control and anger at the moment that the punishment was inflicted...."¹¹

¹⁰ R.v. Peterson, [1995] O.J. No. 1366 (QL) para. 22 .

¹¹ R.v. B.(R.), [2000] O.J. No 1954 (QL) para 67 .

(Because physical force employed by parents is supposed to be used for corrective purposes, the child must be capable of appreciating and benefiting from it. If a child is too young to learn from the correction or incapable due to a mental disability or illness, the use of force will not be justified by Section 43. For example, in *R. v. Serack* (1994), a father was found guilty of assault against his son. The father struck his four year old son twice with a belt on his bare buttocks. The force used caused red welts to appear on the child's buttocks, which were still visible two to three days later. The father was entertaining relatives on the eve of the incident. He put his son to bed around 9:30 pm, but the boy refused to remain there. The father warned the boy to stay in bed, or he would receive a spanking. The father first spanked the child on the buttocks over his pyjamas, then on the bare buttocks, and finally resorted to using a belt after the child repeatedly defied the father's order to remain in bed. As a result of the incident, the child, along with his sibling, was removed from the father's custody. Also, the father was sentenced to a sixty day imprisonment, which was to be served intermittently on the weekends, plus ordered to attend courses on anger management and parenting courses. The child's age played a significant role in the court's judgement. Since the child was extremely young, there was no way for him to protect himself nor seek assistance. The judge stated, "the child herein was very young and completely dependent on his father. He had a right to his father's protection, not to his father's violent wrath. He was too young to call for help, and in the single parent situation, there was no other parent to seek assistance from at the time".¹²)

After determining if the force used by the parent is for corrective purposes, the issue of whether the force exceeded what is reasonable under the circumstances must be

¹² R.v. Serack, [1994] 159 A.R. 392 para. 30 .

considered. When deciding if the force used was excessive, judges follow the guidelines set out in *R.v. Dupperon*. In *R. v. Dupperon* (1984), the father was found guilty of assault for strapping his son, who suffered from severe behavioural problems, with a leather belt on his buttocks approximately ten times after the child was caught misbehaving numerous times.¹³ The force left four to five large bruises on the boy's left buttock. The boy was caught smoking and using foul language, which he was grounded for. The use of the belt was a response to the child's effort to run away from home. In this case, the father was ordered to pay a fine of \$400 and placed on eighteen months probation. The court believed the force used against the child was unreasonable.

In *R.v Dupperon*, the judge took numerous factors into consideration when determining if the force used by the parent was beyond reasonable: (a) the nature of the offence calling for correction; (b) the child's age, character and likely effect the punishment will have on the child.; (c) whether the force used was proportional to the child's offence and was it a significant escalation from the usual discipline methods. Has the parent used corporal punishment in the past and was it agreed upon by both parents; (d) circumstances surrounding the offence; and (e) whether the child suffered injuries. If an injury endangered a child's life, limb, or health this alone is sufficient to find the punishment unreasonable.¹⁴ Over the years, judges have come to rely on these factors when determining if the physical force used was unreasonable under the circumstances.

Also, in cases where it is deemed Section 43 is inapplicable, various factors are taken into consideration before imposing a sentence: (a) whether the accused is rehabilitated, (b) is the child at risk of future harm; (c) effects the sentence will have on

¹³ R.v. Dupperon, [1984] 16 C.C.C. 3(d) 453 .

¹⁴ R.v. Dupperon, [1984] 16 C.C.C. 3(d) 453 para 28 .

the family, such as financial or separation effects; (d) if the accused has a prior criminal record, and whether it is for a violent offence, especially if committed against children; (e) relationship between the family after the incident, is it better or worse and does the family need time together to work out issues; (f) is the sentence contrary to the public interest; (g) the child's behaviour; and (h) does the parent need to obtain better parenting skills.¹⁵

Although the majority of judges rely on these guidelines for determining if Section 43 is applicable, recently some judges have rendered bad decisions, according to the Ontario's Superior Court Judge, Justice McCombs and also the Attorney General of Canada.¹⁶ Bad decisions encompass cases where evidence disclosed that the child suffered injuries, but the parents were acquitted. A few cases are *R. v. Pickard* (1995), *R. v. Burt* (1986), *R. v. Robinson* (1986), and *R. v. Fritz* (1987). In *Pickard* (1995), the father tried forcefully to remove his fifteen year old son from the TV room. In the midst of the scuffle, the father punched the boy in the back of the neck and knocked him down. The boy sustained bruises and scratches on his forehead.¹⁷ In *Burt* (1986), the mother hit her fifteen year old daughter with a wrapped- up extension cord several times. She struck the girl's buttocks three times and the arms and shoulders several times, causing abrasions and broken skin.¹⁸ In *Robinson* (1986), the father struck his twelve year old daughter with

¹⁵ *R. v. Dupperon*, [1984] 16 C.C.C. 3(d) 453; *R. v. Serack*, [1994] 159 A.R. 392; *R. v. Hagger*, [1982] 69 C.C.C. (2d) 76; *R. v. Falconi*, [1982] 41 A.R. 433; *R. v. Yaholnitsky*, [1992] 123 A.R. 151; *R. v. M. (R.W.)*, [1995] 103 C.C.C. (3d) 375; *R. v. Inwood*, [1989] 48 C.C.C. (3d) 173; *R. v. D.(R.S.)*, [1995] 102 C.C.C. (3d) 319; *R. v. B. (W.J.)*, [1994] O.A.C. 363; *R. v. Kornick*, [1995] O.J. No. 2939; *R. v. R.P.*, [2000] O.J. No. 5250; *R. v. Ekpakokak*, [1989] 97 A.R. 127; *R. v. Pope*, [1994] 149 A.R. 238; *R. v. T (B.-L.)*, [1999] 44 W.C.B. (2d) 328; *R. v. Bielenik*, [1999] O.J. No. 4104; *R. v. Poulin*, [2002] 169 C.C.C. (3d) 378; *R. v. E. (A.)*, [2000] 146 C.C.C. (3d) 449

¹⁶ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2000] 146 C.C.C. (3d) 362, para 43.

¹⁷ *R. v. Pickard*, [1995] B.C.J. No. 2861 (QL)

¹⁸ *R. v. Burt*, [1986] 75 N.B. R. (2d) 259

a leather belt four to five times, causing bruises.¹⁹ Finally, in *Fritz* (1987), the uncle, who was in place of the parent, of two teenage girls demanded they strip to their underwear, and then gave the girls three whacks across the buttocks and thighs with a plastic belt.²⁰

The Attorney General for the Government's position also acknowledged that in the past bad decisions were made. For example, judges have applied Section 43 defence in cases where parents caused harm to children. The Attorney General claims that some of those decisions reflect the values of the past while others are simply wrong. However, in the Government's factum to the Supreme Court of Canada, the Attorney General argues that S.43 has developed workable guidelines that protect children from harm.

Aside from rendering bad judgements, some judges failed to follow the guidelines established and imposed personal views. *R.v. K..M.*, (1992) and *R. v. Wheeler* (1990) are examples. In *R. v. K..M.* (1992), the father was charged with assault for spanking, hitting, and kicking his eight year old son for disobediently opening a package of sunflower seeds which fell on the floor. The boy's brother, a two year old, picked up the seeds and began swallowing them and immediately started choking. The appeal judge, O'Sullivan, stated "this case should never have come to the courts".²¹ Also, the judge commented that the boy's punishment was mild in comparison to the discipline he received as a child.²² In *R. v. Wheeler*, a foster mother was charged with assault after slapping her foster son with an open hand on the wrist several times for stealing other kids' lunches at school. The force used resulted in a bruise on the back of the boy's hand and wrist. During the judgement, the judge said that "it is easy to jump to conclusions from looking at the bruise and

¹⁹ *R.v. Robinson* ,[1986] Y.J. No. 99

²⁰ *R.v. Fritz and Fritz*, [1987] 55 Sask. R. 302

²¹ *R.v.K.(M.)*, [1992] 74 C.C.C. 3(d) 108 para. 4 .

²² *Ibid.*, para 5.

reason backward that the force was excessive, but I am quite satisfied that the accused did not intend to cause injury to the child”.²³

Judges rely on various guidelines when determining if the legal defence applies to a case. From this, it is apparent that the entire situation of a case is examined before a decision is reached. This strategy implies that the Canadian judicial system supports the federal government’s view on the state’s role in regard to the family. Parents and families, not the state, are responsible for raising and educating their children. To accomplish this task, parents need to be free from state intervention. The state should interfere in family affairs only if the child is at risk of being exposed to abuse or harm. By taking this approach, the state has adopted a reactive policy approach when dealing with the family.

The State tends to intervene into family affairs only when a child is subjected to harm, abuse or at risk of future harm. Children are either removed from the home, the parent receives a custodial sentence, or the parent is forbidden to have contact with the child unless under supervision. In other cases, the parent is ordered to attend parenting courses, counselling or both. *Inwood* (1989), *Falconi* (1982), and *Pope* (1994) are good examples of state intervention.

In *R. v. Inwood* (1989), the father was found guilty of assault after slapping his infant son on the back seven or eight times in an attempt to make him stop crying. The father then stripped the child. He thought the slapping noise on the bare skin would scare the child, making him stop. The father’s actions caused red marks to appear on the child’s back. The accused was sentenced to thirty days in prison, followed by three years probation. One condition of the probation order was that the father could not have contact

²³ R.v. Wheeler, [1990] Y.J. No. 191 p. 3 .

with his son, except in accordance with the provincial court order²⁴. Also, in *Falconi*, 1982, the father was found guilty of assaulting his two year old son. He found one of his music record covers ripped and immediately thought his son was involved. The father reacted by grabbing and dragging the boy down six to twelve stairs, slapping him in the face a few times, picking him up by the suspenders, and then dropping the boy on the floor. The child suffered a minor cut on the chin and a bruise to the neck. The accused received a custodial sentence of eight days, followed by a probation order that required the accused to attend family counselling. This sentence was based on the fact that the father had no criminal record, was a good worker, the sole provider for the family and also since the family usually got along great.²⁵ In *R. v. Pope* (1994), the father was found guilty of assault after beating his three year old daughter with a belt for disciplinary reasons. The force inflicted caused bruises and welts over various parts of the child's body. As a result, the accused was sentenced to twelve months of incarceration plus probation.²⁶

Recently, there has been criticism of the court's bad judgements and of the state's reactive approach by various groups: the Repeal 43 Committee and the Canadian Foundation for Children, Youth and the Law. Opponents of the present policy approach argue that Section 43 needs to be repealed because it does not protect children from physical harm or abuse and violates their rights.

This is not the first time in Canadian history that there has been discussion about removing Section 43 from the Criminal Code. In the early 1980's, the Law Reform Commission of Canada reviewed this issue. The Law Reform Commission believed that

²⁴ R.v. Inwood, [1989] 48 C.C.C (3d) 173

²⁵ R.v. Falconi, [1982] 41 A.R. 433

²⁶ R.v. Pope, [1994] 149 A.R. 238.

corporal punishment should be prohibited in the school system. This decision was reached fairly easily. However, the issue of determining if corporal punishment should be permitted by parents posed great difficulty for the Commission's members. The Commission did not advocate the use of corporal punishment, and in fact opposed it, but felt removal of Section 43 could have unfavourable consequences for a family, worse consequences than if the section remained. The Law Reform Commission stated, "for it would in principle if not always in practice, expose the family to the incursion of state law enforcement for every trivial slap or spanking. And is this the sort of society in which we would want to live?".²⁷

Why Corporal Punishment is an issue



(Corporal punishment is defined as any form of physical punishment used against a child for the purpose of correcting his/her inappropriate behaviour. Corporal punishment may result in some degree of pain or discomfort, but can not constitute abuse. Spanking, kicking, shaking, shoving, and hitting children with objects, such as straps and belts are common types of corporal punishment.²⁸

Corporal punishment has become a controversial issue. This is due to various reasons, assumptions and beliefs Canadians possess. It has been argued that corporal punishment should be prohibited because it has negative effects on children. Recent studies have shown children who have been exposed to corporal punishment are more likely to become physically aggressive, juvenile delinquents, and suffer emotional problems, such as depression and low self-esteem. Later as adults, they are more inclined

²⁷ Law Reform Commission of Canada. Working Paper 38. Assault. Ottawa: The Commission, 1984.

²⁸ Save the Children Sweden, Hitting People is Wrong- and Children are People too, [<http://www.endcorporalpunishment.org/pages/pdfs/hittingwrong.pdf>], August 2003.

to use physical force against their spouse and/or children.²⁹

Even though most experts agree there is a significant body of evidence to indicate a link exists between corporal punishment and negative outcomes, these studies can not prove corporal punishment is the sole cause for negative outcomes:

Despite the absence of statistically reliable empirical evidence, the experts generally agree that there is a significant body of associational evidence that corporal punishment is a risk factor linked to poor outcomes in children. However, the reliability of the studies is tainted by the fact that other significant variables were present in the studies, variables such as adverse social conditions and other forms of negative parental behaviour. In short, it is impossible to determine with scientific precision whether corporal punishment leads to negative outcomes, or whether it is simply a factor among other negative environmental factors that cumulatively impact negatively upon a child's future.³⁰

In addition, there is a lack of empirical evidence that non-abusive or mild forms of discipline, such as spanking, are effective methods of discipline.³¹ Therefore, some have argued, such as the Ontario Child's Aid Society, "why does the law say it is alright to hit children when there is no evidence that it does not any good..."³²

Regardless, if corporal punishment is the primary cause of negative outcomes, social science experts for both the federal government and the Canadian Foundation for Children, Youth and the Law have come to a consensus on certain issues which pertain to corporal punishment: (a) administering corporal punishment on very young children, especially children two and under, is harmful, wrong and has no value. These children can not understand why they are being hit; (b) it is potentially harmful and ineffective to use corporal punishment against teenagers. Short-term compliance is only achieved and

²⁹ Murray A. Straus, *Beating the devil out of them: Corporal Punishment in American Families and its effects on children* (N.J. : Transaction Publishers, 2001), 56.

³⁰ Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2000] 146 C.C.C. (3d) 362, para 20 .

³¹ Ibid., 20 .

³² Ibid., 30 .

teenagers are at risk of becoming alienated from society, and develop anti-social behaviour; (c) using objects, such as belts and rulers, when employing corporal punishment is harmful and should never be accepted; and (d) a slap or blow to the head is not corporal punishment.³³ These practices are a major concern since judges have acquitted parents who employ the actions outlined above.³⁴

In addition, these experts agree that corporal punishment which results in injury is child abuse. None of the experts advocates the use of corporal punishment, such as spanking. They believe other forms of discipline should be used, such as removal of privileges and time outs. Since there is an absence of evidence that reveals the benefits of spanking, experts basically agree that the only benefit of it is short term compliance. Finally, the experts agree that not every form of physical discipline administered by parents should be criminalized, only abusive ones. Many of the experts believe that the most appropriate way to alter societal attitudes regarding child discipline is through educational initiatives rather than using criminal sanctions to prosecute parents for using non-abusive physical discipline. Experts believe that prosecuting parents who employ non-abusive physical punishment will have negative effects on the family and prevent parents from educating and nurturing their children.

Since the purpose of corporal punishment is to inflict some discomfort or pain on the child in order to correct the child's improper behaviour, such punishment has the potential to cause harm or worse abuse. This issue of corporal punishment resulting in

³³ Ibid., 17 .

³⁴ R.v. Dunfield, [1990] 103 N.B. R. (2d) 172; R.v. Atkinson, [1994] 9 W.W.R. 458; R.v.C. (G.C), [2001] 206 Nfld. & P.E.I. R. 231; R.v. Pickard, [1995] B.C.J. No. 2861 (QL); R.v.D.W., [1995] A.J. No. 905; R.v. V.L., [1995] O.J. No. 3346; R.v. N.S., [1999] O.J. No. 320; R.v.O.J., [1996] O.J. No. 647; R.v.Kearney, [1992] N.J. No. 294; R.v. James, [1998] O.J. No. 1438; R.v.Bell, [2001] O.J. No. 1820; R.v.Laframboise [1989] 8 W.C.B. (2d) 202

harm was evident in recent Canadian court cases. In some cases, the child suffered harm by parents who claimed the physical force used was for corrective purposes, not abuse. For example, in *R. v. Bell* (2001), a father was charged with assault for striking his eleven- year old son with a belt. The father thought the child stole a candy bar. Since this was not the first time the child stole, he did not believe his son when he stated he did not. The physical force used by the father left a bruise which matched the shape of the belt's buckle on the child's thigh.³⁵ The father was acquitted since the Crown failed to prove beyond a reasonable doubt that the force was not for corrective purposes. Also, in *R.v. Pope* (1994), the father was convicted of assault causing bodily harm after beating his three year old daughter with a belt. He claimed the force used was for disciplinary purposes. The child suffered welts and bruises over different parts of the body. As a result, the accused was sentenced to twelve months in prison.³⁶

In addition, there is reason to speculate that a connection exists between physical discipline and child abuse. It is estimated that physical punishment is responsible for the majority of child abuse cases. This connection was revealed in Canada's first national study on the incidence of child abuse and neglect reported to and investigated by child protection workers, which took place in 1998. The report stated that "the majority of substantiated investigations of physical abuse involved inappropriate punishment (69%)".³⁷

Another argument presented for supporting the removal of corporal punishment against children is that corporal punishment conflicts with the principles set out in the

³⁵ R.v.Bell, [2001] O.J. No. 1820.

³⁶ R.v. Pope, [1994] 149 A.R. 238.

³⁷ Nico Trocmé and David Wolfe, *The Canadian Incidence Study of Reported Child Abuse and Neglect* (Ottawa: Statistics Canada, 2001) 5.

United Nations Convention on the Rights of the Child. This Convention, which Canada ratified in 1991, is an international agreement that outlines children's rights. One obligation the Canadian government has under the UN Convention is to take all appropriate legislative, administrative, social and educational procedures to protect children from all forms of harm, which includes physical and mental violence, injury, abuse and neglect, maltreatment, or exploitation.³⁸ In 1995, the Committee on the Rights of the Child, which monitors state parties' compliance with the UN Convention, recommended that the Canadian government prohibit the use of physical punishment against children by the family.³⁹ Since Canada is one of the leading supporters of the UN Convention, it is argued that if Canada is to fulfill its responsibilities under the Convention, corporal punishment must be prohibited. Although the UN Committee is urging the Canadian government to take action to prohibit corporal punishment, nowhere does it state that this must be done through the expansion of criminal sanctions⁴⁰, which will occur if the legal defence that permits parents to use corporal punishment is removed from the *Criminal Code*. This is important since according to the Ontario Court of Appeal, experts agree that "only abusive physical punishment should be criminalized. The consensus among the experts is that not every instance of physical discipline by a parent should be criminalized".⁴¹

Even though groups advocate that corporal punishment should be illegal, a large majority of the Canadian population are against making spanking a criminal offence.

³⁸ Convention on the Rights of the Child, Art. 19

³⁹ United Nations. Committee on the Rights of the Child. Report adopted by the Committee at its 233rd meeting on 9 June 1995, Ninth Session, CRC/C/43.

⁴⁰ Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General), (2001), 161 C.C.C. (3d) 178, para. 22 .

⁴¹ Ibid., 10 .

According to one poll, conducted by Angus Reid in 1999, “only 16% say it should be a criminal offence for a parent to spank their child; an overwhelming 83% degree”.⁴² Most Canadians apparently believe that corporal punishment is a personal issue that is embedded in traditional practices. Canada is a liberal society which means it advocates protecting and respecting the autonomy of individuals and the family; therefore, parents believe they should be free to decide how to discipline their children without state interference. Some parents, also support corporal punishment since it was employed on them as children, without any repercussions. Meanwhile, others claim the use of corporal punishment is consistent with their religious beliefs, “spare the rod and spoil the child”, which means refraining from using corporal punishment will only spoil the child.⁴³ This issue of parents/caregivers being able to use corporal punishment because it is justified in the Bible arose in *R. v. Poulin* (2002). In this case, the accused was a nun who lived in a communal residence with children and their parents in Prince Edward Island. The accused was charged with assaulting five children whom were in her care. The offences were alleged to have occurred between October 1, 1999 to July 25, 2002. The accused admitted she used physical force, namely “strapping with a rod” towards the five children. The rod the accused used against the children was a “spruce board crafted with a handle and measuring approximately 43 cm long by 6.3 cm wide by 2 cm thick (approximately 17 inches by 2 ½ inches by ¾ inch”.⁴⁴ The nun claimed the force used against the children was justified in various passages of the Bible. The court addressed this claim. In Canadian society everyone is entitled to religious freedom; however, that

⁴² Angus Reid, Canadians Overwhelmingly Believe that Spanking Should Not Be A Criminal Offence, [<http://www.ipsos-reid.com/search/pdf/media/pr991206.pdf>], February, 2004.

⁴³ Patricia Chisholm, Who Decides What’s Right?, MacLeans 10 September 2001 .

⁴⁴ *R.v. Poulin* ,[2002] 169 C.C.C (3d) 378 para. 10.

does not imply those beliefs excuse individuals from the law. Individuals, regardless of their religion, are still required to abide by the law and failure to do so will result in criminal prosecution.⁴⁵ In this case, the accused was found guilty of assault and sentenced to eight months in prison followed by a three year probation order. The judge believed that the force used was excessive and used too frequently, considering that on some occasions the children received up to 14 strikes on the buttocks with the rod, and on other occasions the accused would pull on the children's ears until they cracked and bled.

In addition, proponents of corporal punishment claim it is the only effective way to get a difficult child to comply or cease disruptive behaviour. They argue that banning corporal punishment leaves parents with no efficient means to discipline or control their children, thus children become uncontrollable. This is questionable. In countries where corporal punishment is prohibited, either through legislative reforms or educational programs, there is no result of children becoming uncontrollable either at home or school.⁴⁶

Finally, opponents assert that corporal punishment violates children's fundamental rights to respect for human dignity and physical integrity. One of the main purposes of the criminal law is to protect individuals' physical security. Children are denied that right since parents are given a legal defence when employing physical punishment against their children under certain conditions. This defence is crucial because without it parents would not be excused from administering force, and in fact would be held criminally liable for their actions. Not only does corporal punishment deny children the protection of physical security, it fails to offer them the same protection

⁴⁵ R.v. Poulin, [2002] 169 C.C.C (3d) 378 para. 10.

⁴⁶ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's ban on Physical Punishment* (London: Save the Children, 2000) .

every human being is entitled to, thus discriminating against them. Corporal punishment against any other group of people, except children, is illegal.

These issues, beliefs and assumptions have resulted in the controversy over whether corporal punishment should be legal in Canada. Analyzing the legality of corporal punishment is very difficult for the reasons outlined above. However, it is important to review these issues in order to determine whether Canada's present policy approach regarding corporal punishment offers children the best protection.

Government's Response to the Criticisms for failing to Repeal Section 43

The federal government refuses to eliminate Section 43. It believes parents, when raising and educating their children, need some leeway, free from state interference. Also, the Canadian government believes striking down this legal defence will result in unnecessary state intervention, which will likely cause more harm than good for the child. The Canadian government does not advocate the use of corporal punishment. Recently, it implemented educational programs, through Health Canada, to teach parents other effective means to discipline their children. Examining the federal government's rationale for refusing to remove Section 43 reveals they are indeed valid claims of concerns, and that criminalizing corporal punishment may not be the best way to address this issue.

Regardless of this growing criticism, the Federal Government and the Canadian judiciary oppose the removal of Section 43. They claim that since the definition of assault under the *Criminal Code* is broad, if Section 43 were eliminated, minor physical punishment such as spanking and physically removing or restraining a difficult child,

such as putting a child to bed or restraining a child in a car seat, could constitute assault.⁴⁷ Also, both judiciary and the federal government are concerned about the negative effects removal of Section 43 could have on the family. Emotional harm to a child may result from having the child testify against his/her parents, imposing a custodial sentence on the parent, or worse removing the child from the home, thus separating the child from the parents. These effects are a major concern, since they can be traumatic for a child. This issue of the negative effects criminalizing corporal punishment could have on the family played a significant factor in the Supreme Court of Canada's decision. According to Chief Justice McLachlin, "the decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families – a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process".⁴⁸

Important consideration must be given to this issue since negative outcomes from charging parents already exist. In *R v. Wheeler* (1990), the accused was charged with assaulting her seven year old foster son. The foster son and his two siblings lived with the foster parents since 1985. These children, due to their developmental delay, required extensive care and attention, and they received that from the accused and her husband. On the day of the incident, the foster son was caught stealing lunches at school, which was not the first time. In the past, the foster parents disciplined the boy for his actions. The discipline consisted of talking to the boy, removing privileges, or sending him to his room. However, on this occasion, the accused took the boy's hand and gave him several slaps on the wrist with an open hand, telling him how disappointed she was, and

⁴⁷ Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC

4.

⁴⁸ Ibid., para.62 .

explained why the behaviour was wrong. The accused's actions caused a bruise on the child's hand and wrist. Even though the accused was acquitted, since the force was for corrective purposes and not excessive, the foster children were removed from the home by the Department of Social Services. The court noted the removal as a tragedy.

According to the judge, "...it is a real tragedy these three children lost what was obviously an excellent and loving home in exchange for what has now been some seven months at the Receiving Home."⁴⁹

The *James* case (1998) is another example that reveals the negative effects prosecution can have on a family. In this case, the father was charged with assault after striking his eleven year old son in the face. The force used was to deter the boy from swearing. The father noticed the boy was wearing the same clothes as the day before. There was a house rule which required clean clothes must be worn to school. The father told the boy to change. While the father was watching the boy angrily pull clothes out of the drawer, he heard the child say the "F" word. This type of language was forbidden. The father responded by smacking the child with an open hand on the face. He claimed the force was directed at the shoulder, but the boy moved as the force was applied. The force used left a mark on the child's cheek. As a result, the father, who had no prior criminal record, was held for a bail hearing. Since it took the father five days to obtain the release amount, \$10, 000.00, so he could be released from custody, he lost one of his jobs. This is a concern because Mr. James relied on the two jobs to support his family. Also, even though there was no child protection concerns, a non-association clause was placed in Mr. James' bail. Therefore, the father had no contact, directly or indirectly, with his son for approximately six months. The judge acquitted the father since it was believed

⁴⁹ R.v. Wheeler, [1990] Y.J. No. 191 p. 2 .

the force was used for corrective purpose and not excessive. The judge also acknowledged the negative effects of charging the father: "...the James family has found itself broken in two by the justice system's intervention. Regardless of my decision here, this family will in all probability need help to rebuild itself as a result of these charges. I worry that irreparable damage has been done to this child and this father, a level of damage which is not, in my opinion, proportional to the behaviour sought to be averted."⁵⁰

Inflicting negative effects on the family is a serious concern. The majority of parents in the fifty cases examined-both the guilty and non-guilty cases-, appeared to be good, caring and loving parents. They only wanted the best for their child and believed their actions were needed in order to correct the child's disruptive behaviour. In the majority of the cases, the children were either defiant teenagers or very young hyper-active children. In many cases, the parents first attempted to use alternatives, such as talking to the child, time outs or groundings. But after these methods failed and the child continued to be defiant, parents resorted to physical force, and in some cases parents regretted using it after the incident.

From reviewing the fifty cases, it is obvious the majority of parents did not intend to inflict harm on the child. They were extremely frustrated with their child's behaviour and did not know what other methods to employ, so they resorted to physical force. *R. v. O.J.*(1996) and *R. v. M. (R.W.)*(1995) , are good illustrations of cases where the parents were good, but at wits end and did not know what else to do to control their child's inappropriate behaviour, therefore, resulted to the use of force.

In the *O.J* case (1996), the mother on several consecutive mornings was having

⁵⁰ R.v. James, [1998] O.J. No. 1438 para. 4 .

great difficult getting her child ready for school. Her six-year-old daughter refused to get dressed or brush her teeth. The mother tried talking to the child but this had no effect. On the day of the incident, the mother instructed the child to get dressed. When the accused went to check whether the child was doing so, she found her lying on the bed. The mother reacted by spanking the child twice on the buttocks with an open hand. The child then talked back to the mother, stating that when she grew up she would do the same to her mother. In response, the mother grabbed a plastic ruler and spanked her bottom over the pyjamas, causing bruises and red marks to appear. The parent was acquitted. The judge believed the spanking was for corrective purposes and not excessive.⁵¹

In *R.v. M (R.W.)*, (1995), the accused was charged with assault after striking his thirteen year old daughter with a belt seven to eight times. The father struck the girl in the face, chest, lower torso, arms and legs, causing abrasions and bruises over these areas. The accused denied intentionally hitting the girl in the face and chest. He testified the child moved around a lot, which made it possible for her to be hit in the face and on the chest. Various factors led up to this event. The daughter was continuously defiant and disobedient. She failed to abide by her parents' rule, which forbid her to date older boys. On the day of the incident, the daughter skipped school and was found by the father in a car with an older boy. Prior to this, the parents used other methods to discipline, such as groundings and removing privileges. The judge found the father guilty of assault. Although the judge believed the accused administered the force for corrective purposes, it was ruled the amount of force used was excessive.⁵²

Even though removal of Section 43 has the potential to cause negative effects on a

⁵¹ R.v. O.J., [1996] O.J. No. 647

⁵² R.v.M. (R. W.), [1995] 103 C.C.C. 3(d) 375

family, these effects must be weighed against the fact that children under this reactive approach are exposed to harm, even in cases where parents received an acquittal.

Between 1986 until 2001, the Canadian judicial system found the following punishment to be reasonable: (a) hitting children with belts, rulers, piece of plywood, horse harness, and an extension cord; (b) slapping a child in the face, mouth, punching the back of the neck, kicking with a stocking foot, grabbing, and pushing; and (c) force that resulted in bruises, welts, red marks, abrasions, nose bleeds and swollen lips.

Although these types of physical punishment would not be classified as severely debilitating nor resulted in permanent injury, the force used and the injuries inflicted were beyond minor and had the potential to cause severe harm. For example, in *R. v. Atkinson* (1994), the accused was charged with assaulting her two foster children and niece. All three children were under the age of four. The accused hit the children with a belt when they misbehaved. The judge acquitted the accused since there was no evidence the force used was excessive. In this case, the judge pointed out the potential danger of using a weapon, such as a belt when disciplining children. The judge stated, “while the amount of force used when striking a child with a belt may be no different than the amount used when striking a child with an open hand, the crucial difference is the increased risk of potential physical harm when a belt is used”.⁵³

Since the present law does not include these measures as unreasonable and judges in the past have not deemed them excessive, action must be taken to ensure children are not subject to these types of treatment. They have negative effects on the child as stated by the experts in the Ontario Superior Court decision, which were outlined above.

In some cases where the parents were found guilty, children were exposed to

⁵³ R.v. Atkinson, [1994] 9 W.W.R. 485 para. 24 .

severe harm in the name of discipline. Some children were subjected to extensive bruising as a result of being struck by a belt. For example, in *R. v. B.H.*(1998), the accused was charged with assault after strapping his thirteen year old daughter with a belt, which resulted in extensive bruising on her arms, neck, and buttocks. The daughter was very rebellious and difficult to handle. The father was very concerned about the girl's sexual activity with her boyfriend. On the day of the incident, the daughter arranged to meet her boyfriend without adult supervision, which was forbidden. The accused found out about the meeting. He was upset because the daughter lied about where she was going and broke the family's rule. In this case, the judge held the amount of force used against the daughter was unreasonable; therefore, a guilty verdict was delivered.⁵⁴ This type of harm could be classified as abuse, which is a serious concern since child abuse can have negative effects on a child. Child abuse is associated with behavioural, social, and academic problems. These effects not only affect one's childhood but can persist throughout life. Evidence reveals child abuse is "linked to teen pregnancy, alcohol abuse, unemployment, street violence, poverty and street violence".⁵⁵

Examining the pros and cons of Section 43 reveals a dilemma has evolved. For valid reasons, it appears removal of Section 43 may not be the best solution since it has the potential to cause negative effects on the family. However, groups advocating the removal of Section 43 do not accept the federal government's arguments and have responded to them. The two main groups in Canada advocating for the removal of Section 43 are the Repeal 43 Committee and the Canadian Foundation for Children, Youth and the Law.

⁵⁴ R.v. B.(H), [1998] 201 N.B. R. (2d) 315

⁵⁵ Katharine Covell and Brian Howe, *The Challenge of Children's Rights for Canada*, 85 .

The Repeal 43 Committee was established in 1994 to advocate the Federal government to remove Section 43 from the Criminal Code. The Committee is a national, multi-disciplinary volunteer committee comprised of lawyers, social workers, educators, and doctors, most of whom are parents.⁵⁶ The Canadian Foundation for Children, Youth and the Law is a child advocacy group, also pressuring the federal government to remove Section 43, but has decided to do this through the courts. This group has challenged the constitutionality of Section 43 before the Ontario Superior Court(1999), the Ontario Appeal Court(2001), and in June 2003 the Supreme Court of Canada. This organization argues Section 43 is unconstitutional; it offends certain sections of the Charter of Rights and Freedoms. First, s.43 violates s. 7, the right of security of the person. The Foundation claims it does not grant procedural protections to children, fails to further the best interest of the child, and is too vague and broad. Next, it offends s. 12, the right to be protected against cruel and unusual treatment. Lastly, s. 15 is violated because it denies children the legal protection against assaults adults are granted. All three courts rejected the Foundation's arguments.

The Supreme Court ruled Section 43 is not unconstitutional. First, s.43 does not offend s.7 of the Charter. Procedural safeguards protect children's interest since their interests are represented by the Crown at trial. Secondly, although acting in the best interest of the child is a legal principle, it is not a principle of fundamental justice. Finally, the Court ruled that s.43 is not vague or broad. It explicitly identifies who can access this legal defence: parents, teachers, and persons standing in the place of a parent. In *Ogg-Moss v. R* (1984), the Court outlined the phrase "place of a parent". It

⁵⁶ Repeal 43 Committee , Welcome to Repeal 43 Committee, [<http://www.repeal43.org/>], June 2003

encompasses an individual who assumes “all the obligations of parenthood”.⁵⁷ The Court, also, stated s.43 is not vague on what force is permitted. Force must be for corrective purposes, can not be motivated by anger, and the child must be capable of benefiting from the correction. Additionally, the term “reasonable under the circumstances” is not vague. S.43 does not permit conduct that causes harm or raises a reasonable prospect of harm. According to the Court, s.43 “ can be invoked only in cases of non-consensual application of force that results neither in harm nor in the prospect of bodily harm”.⁵⁸ Also, the Court’s majority rejected the argument by Justice Arbour, a dissenting judge, that unconstitutional vagueness occurs when courts apply s.43 inconsistently, which has happened in the past. The Chief Justice states, “vagueness is not argued on the basis of whether a provision has been interpreted consistently in the past, but whether it is capable of providing guidance for the future. Inconsistent and erroneous applications are not uncommon in criminal law, where many provisions admit of difficulty; we do not say that this makes them unconstitutional.”⁵⁹

The Court rejected the Foundation’s claim that s.12 is violated. Section 43 does not allows conduct that raises to the level of being cruel or unusual. It permits only force that is corrective and reasonable. According to the Court, “conduct cannot be at once both reasonable and an outrage to standards of decency. Corrective force that might rise to the level of “cruel and unusual” remains subject to criminal prosecution.”⁶⁰

In addition, the Court concluded that s.43 does not violate s.15(1) of the Charter. S.43 does not offend children’s dignity. It allows limited force, which needs to benefit the

⁵⁷ Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 para. 21 .

⁵⁸ Ibid., 30 .

⁵⁹ Ibid., para 44 .

⁶⁰ Ibid., para 49 .

child. Abusive and harmful actions are prosecuted under criminal law. The Court went further; it stated that although children need a secure and safe environment, they rely on parents for guidance and discipline to guard them against harm and to foster their healthy development within society. Section 43 is the government's attempt to meet these objectives. It provides parents with the ability to educate their children without being subjected to criminal sanctions. Without s.43, Canada's broad assault law would lead to the criminalization of corporal punishment by parents. According to the Court, "the decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families— a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process".⁶¹

The Supreme Court also replied to the Foundation's claim that unnecessary state intervention into the family could be avoided by relying on prosecutorial discretion. The Court rejects such a claim and states that such action would be contrary to the Foundation's arguments: "as the Foundation asserts in its argument on vagueness, our goal should be the rule of law, not the rule of individual discretion".⁶²

Regardless of the Canadian government and the judiciary's rationale for refusing to repeal Section 43 of the *Criminal Code*, opponents argue that Canada needs to adopt similar measures taken by other countries that have prohibited corporal punishment against children. The next chapter discusses these measures and outlines specifically Sweden's actions.

⁶¹ Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 para. 62 .

⁶² Ibid., para 63 .

CHAPTER THREE

PROHIBITING CORPORAL PUNISHMENT AND SWEDEN'S EXPERIENCE

Recently, the Canadian government is being pressured by groups to follow in the footsteps of other countries that enacted legislation which makes corporal punishment illegal. The first part of this chapter discusses the countries that have prohibited the use of corporal punishment, and examines Sweden's approach in detail, since it is often claimed Canada should adopt such a model. The last section discusses possible reasons why the Canadian government would have difficulty implementing such an approach.

During the last three decades, various countries, predominantly European ones, have taken the initiative to eliminate the use of all corporal punishment against children. Eleven countries have done so through legislative reforms: Sweden (1979), Finland (1983), Norway (1987), Austria (1989), Cyprus (1994), Denmark (1997), Latvia (1998), Croatia (1999), Germany (2000), Israel (2000), and Iceland (2003). Also in Italy (1996), the Supreme Court in Rome, declared all corporal punishment against children to be unlawful. The Court stated "the use of violence for educational purposes can no longer be considered lawful".¹ The verdict arose from a case where the father was charged with continuously subjecting his ten-year-old daughter to brutal beatings in the name of discipline. The father would kick or hit the girl for lying, getting bad grades, or failing to live up to his standards.²

Most of the following countries' bans on corporal punishment were implemented

¹ Susan H Bitensky, "Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children", *University of Michigan Journal of Law Reform* 31, no. 2, (1998): 380.

² Susan H Bitensky, "Final Straw: To Spank or Not to Spank", *Chicago Tribune*, 25 July 1996 [www.nospank.net/bitensky.htm], January 2004.

through a series of legal responses. First, action was taken to forbid the use of physical punishment in schools and child care institutions. The second step was the repeal of a specific section from the criminal or penal code, which had provided parents accused of physically assaulting their children with a legal defence on the grounds that the force was employed for corrective purposes. Thus, children now receive the same protection as adults under the law. Finally, the use of physical discipline by all caregivers, including parents, was explicitly prohibited in civil law.³ For example, Finland repealed its legal defence of lawful chastisement from its Criminal Code in 1969. In 1983, the explicit prohibition of corporal punishment was written in the **Child Custody and Rights of Access Act**, which is a family law. The legislation reads:

A child shall be brought up in a spirit of understanding, security and love. He shall not be subdued, corporally punished or otherwise humiliated. The growth of a child towards independence, responsibility and adulthood shall be supported and encouraged.⁴

Not every country had a legal defence of reasonable chastisement in their Criminal Code. For example, Latvia, Cyprus, Croatia, and Germany, did not have such a defence. In such cases, the prohibition of corporal punishment was enacted strictly through a civil code. Also, Israel's judicial system, not Parliament, first initiated the prohibiting of all types of physical punishment against children. This decision evolved from a child abuse case, **Natalie Bako vs. the State of Israel**. The accused was convicted of assaulting and abusing her children following accusations that she hit them regularly and violently between 1994-1995. Such incidents included striking her daughter with a vacuum cleaner, and punching her son in the mouth, causing one of his teeth to break.

³ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of countries that accord children full legal protection from physical punishment. Edited by Lucy Thorpe (UK: NSPCC) 7. [<http://www.nspcc.org.uk/inform/downloads/EqualProtectionForChildren.pdf>] November 2003 . #

⁴ Ibid., 23.

The accused appealed the conviction to Israel's Supreme Court claiming her actions were acceptable discipline practices. The appeal was rejected, and it was declared that parental physical punishment is illegal.⁵ The decision was supported by Israeli legislation which removed the statutory defence of reasonable chastisement that same year.

Parental prosecution is not the objective of these corporal punishment bans. Most of the bans, except for Israel's and Italy's, are implemented through civil codes, which attach no criminal sanctions. The purpose is to clarify that parental and other assaults against children in the name of discipline are assaults, and will be prosecuted as such under criminal law. If parental actions can be deemed as an assault against others, then the act constitutes a criminal offence, regardless if committed for disciplinary means. Parents who commit assault against their children could be sued for damages, fined or receive a custodial sentence, depending on the assault's seriousness. This sends a clear message that children now receive the same protection as adults under the law.

Even though the bans explicitly forbid the use of corporal punishment, certain countries, such as Iceland and Sweden, accept that parents are able to use physical restraint in cases where the child poses a threat to him/herself or others.⁶ Also, non-serious violations of the ban are not subjected to punishment, but in certain countries, such as Sweden, Norway, Finland and Austria, this issue can play a role in determining custody.

The main objective of the bans on corporal punishment is education. The aim is to encourage parents to use non-physical techniques when disciplining and raising their

⁵ Israel Supreme Court, Criminal Appeal 4596/98 Plonit v A.G. 54(1) P.D. p. 145, unofficial translation [http://www.endcorporalpunishment.org/pages/pdfs/Israel_Judgment.pdf] December 2003

⁶ End All Corporal Punishment , States with Full Abolition, [<http://www.endcorporalpunishment.org/>] November 2003 .

children. These reforms were accompanied by educational initiatives, which in some countries were more extensive than in others. In Denmark, an information campaign was designed by the National Council for Children, which was partly funded by the Ministries of Justice and Social Affairs. The campaign's purpose was to inform parents and professionals about the law's changes, and to encourage parents to use a more "open, accepting and humane practice in the upbringing of children."⁷ This campaign consisted of various initiatives. A pamphlet was produced for parents who had children under ten. Eight hundred thousand copies were distributed by teachers, health professionals and child-care workers. The pamphlet offered information on how parents can educate their children without resorting to physical punishment, and supplied information on organizations that can offer assistance to families. Another brochure was developed for ethnic minorities. Also, a magazine has been produced for parents, and can be obtained from professionals. It is a weekly magazine and includes real-life stories on various issues, questions and answers as well as children's views. Posters were supplied to all primary schools and postcards were distributed free of charge in cafes; they included a no slapping logo.⁸

Numerous factors influenced the ban on corporal punishment. A growing concern over child abuse and how physical punishment could be contributing to its prevalence was a key factor. For example, "research undertaken in the late 1970's showed that half of the battered child cases in Finnish and Swedish courts had started as physical

⁷ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of Countries that accord children full legal protection from physical punishment, 37.

⁸ Ibid., 37.

punishment.”⁹ Also, in some countries, children were subjected to severe violence. In Israel, “between 1998 and 1999, the number of violent crimes committed in Israel against minors within their families rose by nearly 300 to a total of 1,817 per year.”¹⁰

For some countries, the ban was brought about by a growing concern to address family violence which caused both physical and emotional harm. In 1994, Cyprus’ reform made all types of violence that occurred within the family illegal, which includes the use of physical punishment against children. The legislation states, “any unlawful act or controlling behaviour which results in direct actual physical, sexual, or psychological injury to any member of the family is prohibited”.¹¹ Subsequently, there was a growing movement to provide families with more social supports, and to promote the recognition that children are individuals who are bearers of rights, which was evident with the creation of a Children’s Ombudsman in most of these countries. Its role is to promote children’s rights, campaign for the protection of children, and provide individual cases with support. These measures apply especially to the four Nordic countries: Sweden, Finland, Denmark, and Norway. Their welfare systems are social democratic, and built upon the principles of universalism and equality. The state spends large sums of money on public services, and is regarded as highly responsible for the family and its members. Also, over the years, these countries have taken great means to foster a culture which respects children’s rights.

The signing of the United Nations Convention on the Rights of the Child became

⁹ Rowan Boyson, “Equal Protection for Children : An Overview of the experience of Countries that accord children full legal protection from physical punishment, 24.

¹⁰ Frimet Roth, Israeli Legislature Backs Up High Court to Shield Children from Parental Violence , Jerusalem Post, 3 July 2000 [<http://www.nospank.net/israel2.htm>] December 2003 .

¹¹ Rowan Boyson, “Equal Protection for Children : An Overview of the experience of countries that accord children full legal protection from physical punishment, 33.

a driving force to eliminate corporal punishment against children. The above countries ratified the Convention, which calls upon state parties to take action to eliminate children from being subjected to physical harm. Article 19 states,

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹²

Denmark's ban was in part a response to the Committee on the Rights of the Child's recommendations; this Committee monitors state parties' compliance to the Convention. It declared that Denmark needed to implement additional measures to safeguard children from violence, including from the family. This factor led to Denmark amending its **Parental Custody and Care Act** in 1997. The amendment states: "The child has the right to care and security. It shall be treated with respect for its personality and may not be subjected to corporal punishment or any other offensive treatment".¹³

Determining the ban's effects poses difficulty. All countries need to conduct further research to reveal its effectiveness. In regards to whether the ban on physical punishment alters public attitudes, it is still unclear. Research conducted in some countries reveals that public attitudes have changed. For example, in Denmark, in 1980 only 26 per cent of the population were against the use of physical punishment against children. In 1997, a public opinion poll revealed 57 per cent of the population were against such a practice.¹⁴ Parents now favour positive discipline techniques and are generally embarrassed to admit they used corporal punishment in the past. However, a

¹² Convention on the Rights of the Child, Art. 19

¹³ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of countries that accord children full legal protection from physical punishment, 35.

¹⁴ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of countries that accord children full legal protection from physical punishment, 38.

minority of families still use it. In other countries, the ban's effects on altering public attitudes is uncertain due to lack of evaluations.

Furthermore, it is difficult to conclude whether a ban on corporal punishment results in a decline of use. In the above countries, physical punishment is still used by some parents today. For example, in Finland, the most recent large-scale survey on family violence against children, published in 1992, revealed "a fairly high prevalence of mild physical punishment in the six years following the 1983 ban, although only a small percentage of the respondents reported having experienced any violence in the preceding 12 months".¹⁵ Nevertheless, one apparent fact is that the ban has not resulted in an increase in the prosecution of parents, which is a major concern for opponents of a corporal punishment ban. Lastly, since some countries' legislation is relatively new, such as Germany (2000), Israel (2000) and Iceland (2003), it is too early to state its effects.

Physical punishment bans did not escape public objection. In fact, Finland is noted as the only country to enact such a legal reform with the majority of public support: "Sixty per cent of respondents-and 72 per cent of those aged 15 to 24 agreed, making Finland the only country to introduce legal reform with majority public support".¹⁶ Some countries experienced both public and political opposition. For example, in Norway, 68 per cent of the population were against prohibiting physical punishment, and the Norwegian Parliament attempted twice, 1982-83, to enact legislation that prohibited the use of physical punishment but were unsuccessful.¹⁷ Also, in some countries, the public

¹⁵ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of countries that accord children full legal protection from physical punishment, 25.

¹⁶ Ibid., 24.

¹⁷ Ibid., 28 .

claimed the ban would lead to state interference into the family.¹⁸ This argument is commonly used by opponents of such a ban in Canada. Unfortunately, it is difficult to state how extensive opposition was. There is a lack of information available on the public attitudes towards physical punishment bans when enacted.

For the majority of these countries research on the ban's effects is scarce. Sweden's ban appears to be the one researched the most, but future research is still needed. To understand how a ban on corporal punishment operates and its possible effects, examining Sweden's approach is necessary.

Sweden's Corporal Punishment Ban

A hundred years ago, corporal punishment was widely practiced in Sweden and consequently countless children suffered brutal beatings. Today, however, Sweden is reputable for being the first country to explicitly ban the use of all forms of physical punishment against children by caregivers, including parents. This movement towards abolishing corporal punishment has been part of a series of reforms that has taken place over the span of several decades.

The early twentieth century was marked by a growing concern over child welfare. In 1928, Sweden took the initiative to ban the use of corporal punishment in secondary schools by amending its *Education Act*. Violence against children in the home persisted. Sustaining the reasonable chastisement defence for caretakers who employed corporal punishment for corrective purposes was seen as a contributing factor. This defence, which was outlined in the *Penal Code*, was revoked in 1957. Such action was to provide

¹⁸ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of countries that accord children full legal protection from physical punishment, 38 .

children with the same degree of protection from assault that adults receive under the law, and to clarify guidelines for the criminal prosecution of parents who inflict physical harm on their children.¹⁹

Parents' right to administer physical punishment was not eliminated entirely. The *Parents' Code*, a civil law regulating family matters, included a paragraph permitting parents to use mild forms of physical punishment that did not constitute assault under the *Penal Code*. In 1966, this provision was repealed from the *Parents' Code*, but it remained unclear if corporal punishment was prohibited.²⁰

It was anticipated that these legislative reforms combined with the ban on corporal punishment in child care facilities and all schools during the 1960's, would be effective in conveying the message that corporal punishment was no longer an acceptable method of discipline. This was not the case. The 1960's and 70's marked a serious concern over child abuse. In 1971, a four-year-old girl was beaten to death by her stepfather.²¹ This led to a public outcry and the formation of the Children's Rights in Society (BRIS). This organization campaigned against child abuse and installed a children's helpline. Then in 1975, another severe child abuse case occurred, and the father who inflicted the injuries on his three-year-old daughter was acquitted by the court, which claimed the father "had not exceeded his right to chastise his daughter".²² Public criticism over these cases combined with a general concern over child abuse led to the

¹⁹ Joan Durrant, "Evaluating The Success of Sweden's Corporal Punishment Ban," *Child Abuse and Neglect* 23, no. 5 (1999): 436 .

²⁰ Barbro Hindberg, *Ending Corporal Punishment: Swedish Experience of Efforts to Prevent All Forms of Violence Against Children and the Results* (Sweden: Ministry of Health and Social Affairs and Ministry of Foreign Affairs, 2001) 21 .

²¹ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of Countries that Accord Children Full Legal Protection from Physical Punishment.

²² Joan Durrant and Gregg M Olsen, "Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban," *Journal of Social Welfare and Family Law* 19, no. 4 (1997): 445 .

installation of the Commission on Children's Rights by the Ministry of Justice in 1977.

The Commission consisted of a wide range of professionals: lawyers, psychologists, psychiatrists and politicians. Its objective was to develop better provisions for children's rights and welfare and to analyze the *Parents' Code* and make recommendations.

In regards to the *Parents' Code*, the Commission declared the guidelines provided to parents and legal authorities lacked clarity with respect to corporal punishment. It was not clear whether corporal punishment was not acceptable but permitted, or whether it was prohibited completely. The Commission proposed to attach a paragraph to the *Parents' Code* that clearly forbade the use of corporal punishment. It was approved "by 28 of the 30 experts who reviewed it, all political parties, and 98% of Parliamentary members".²³ The proposal was passed by Parliament in 1979, and came into effect in July of that year. The added paragraph reads as follows:

Children are entitled to care, security and a good upbringing. They shall be treated with respect for their person and their distinctive character and may not be subjected to corporal punishment or any other humiliating treatment.²⁴

Although this legal reform was endorsed by Parliament, it did not escape opposition. Chief criticism came from seven parents, who were members of a Protestant free church congregation in Stockholm. They believed in traditional methods of raising children and felt corporal punishment was a necessary component. They justified the use of physical discipline by referring to sections of Biblical text. The parents were not being prosecuted for assaulting their children. In fact, they made an application to the European Commission of Human Rights in 1979. The complainants argued Sweden's new legislation was a violation of the right to respect for family life. This right is outlined

²³ Joan Durrant, "Evaluating The Success of Sweden's Corporal Punishment Ban," 436 .

²⁴ Barbro Hindberg, *Ending Corporal Punishment: Swedish Experience of Efforts to Prevent All Forms of Violence Against Children-and the Results*.

under Article 8 of the European Convention on Human Rights.²⁵

The European Commission rejected the application; concluding the complainants failed to prove the legislation infringed on the right to respect the family. These individuals were not being prosecuted for violating the law, and failed to present evidence that the state was prosecuting parents for using corporal punishment or removing children from the home. The Commission acknowledged the ban's objective is not to prosecute parents or remove children from their custody, but to encourage parents to use non-violent measures when disciplining children.²⁶ Further, the Commission believed the complainants did not prove the provisions of Sweden's law criminalizing assault on children are unusual.

The fact that no distinction is made between the treatment of children by their parents and the same treatment applied to an adult stranger cannot, in the Commission's opinion, constitute an interference with respect for the applicant's private and family lives since the consequences of an assault are equated in both cases.²⁷

Also, the European Commission believed Sweden's legislation was an appropriate means to protect the vulnerable members of society.²⁸

As previously mentioned, the ban has an educational purpose, which is evident in the fact that the prohibition of corporal punishment is written into the *Parents' Code*, not the *Penal Code*, and is unaccompanied by criminal sanctions. Therefore, mild forms of physical discipline against children are not punishable under any special provision or by criminal law. Punishment falls under the *Penal Code*, and is enforced only in cases where

²⁵ Eur. Commission H.R., no 8811/79 Seven Persons v. Sweden, 13 May 1982, D&R, Vol. 28, 113.

²⁶ Ibid.

²⁷ Ibid., 113

²⁸ Karl Hanson, "Violence Against Children: The Debate on Corporal Punishment before the European Commission and European Court of Human Rights (1978-1998) [<http://www.childrightseducation.org/english/archives/hansonart.html>] November 2003 .

the criteria of assault are met. For an offence to be classified as an assault, an individual's action must have inflicted bodily injury, illness, or pain on another person.²⁹ If parents are found to be in violation of the new law, the case is heard in civil rather than criminal court, and the parent may be referred to counselling and/or programs that offer information on non-physical methods of discipline.³⁰ Also, the use of physical punishment could result in a loss of custody, but there is no evidence to suggest that this is occurring.³¹

In keeping with this non-punitive approach, Sweden's government launched a massive public education campaign. A media campaign provided key information on the new law. Most importantly, the Ministry of Justice designed a sixteen page brochure, entitled "Can you Bring up Children Successfully without Smacking and Spanking?". The pamphlet was distributed to every household with young children, to medical offices and child care facilities, and translated into all immigrant languages. It is noted as the most expensive pamphlet distribution campaign ever carried out by the Ministry of Justice.³² The pamphlet provided extensive information about the new law which prohibits physical punishment, including spanking, its rationale, and outlined other discipline techniques parents could use. Although all forms of physical punishment are forbidden, it is clear parents and caregivers can still use physical restraint to protect a child from injuring oneself, such as pulling a child away from a fire or placing a defiant toddler in a car seat. According to the Swedish Standing Committee on Law Procedures,

²⁹ Eur. Commission H.R., no 8811/79 Seven Persons v. Sweden, 13 May 1982, D&R, Vol. 28, 113

³⁰ Norma D. Feshbach, "Tomorrow Is Here Today In Sweden," *Journal of Clinical Child Psychology* Summer 1988: 110 .

³¹ Eur. Commission H.R., no 8811/79 Seven Persons v. Sweden, 13 May 1982, D&R, Vol. 28, 113

³² Klaus A. Ziegert, "The Swedish Prohibition of Corporal Punishment: A Primarily Report", *Journal of Marriage and the Family* November 1983 : 920 .

physical restraint is “necessary if the parents are to fulfill their obligations to supervise the child. The intention of such acts is never to punish and they have no consequences under the criminal law or the Code of Parenthood”.³³

Information pertaining to the law was printed on milk cartons for two months; this way the issue would be presented at mealtimes, which appears to be the key time parents and children come together to discuss important issues.³⁴ Moreover, since the formal legislation is relatively short, it has often been used in schools to educate students about the parliamentary process. Also, in the school system, the issue of physical punishment was discussed in an English Language exercise. As a result of these educational campaigns, “by 1981, a total of 99% of Swedes were familiar with the law - a level of knowledge unmatched in any other study on knowledge about law in any other industrialized society”.³⁵

Education regarding the law continues in Sweden today. Discussions of the law take place in parenting and family life classes in Sweden’s schools and in parental education courses that are offered to expecting parents and in well-baby clinics, which are used by almost 100 per cent of the population. Recently, in 2001, the Sweden Parliamentary Committee on Child Abuse produced *A Book for Parents*, which offers support and encouragement to parents. This pocket size book reveals stories of physical punishment and emotional harm in the family. For example, one story includes a single mother who uses corporal punishment to correct her young child when he misbehaves.

³³ Eur. Commission H.R., no 8811/79 Seven Persons v. Sweden, 13 May 1982, D&R, Vol. 28, 113, 107.

³⁴ Joan Durrant and Gregg M Olsen, “Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban,” 445.

³⁵ Joan Durrant, *The Swedish Ban on Corporal Punishment: Its History and Effects*, Edited by Detlev Frehsee, Wiebke Horn, Kai-D Bussmann *Family Violence Against Children: A Challenge for Society* (New York: Walter de Gruyter, 1996) 22 .

This book also provides advice to parents about alternatives to physical force, such as the importance of discussing the issue with children, and talking through problems. Half a million copies were distributed to pharmacies and child health-care centres. Schools and social services have also ordered copies to be used in parenting courses.³⁶

Sweden's ban has three central objectives. Primarily, the ban is to alter public attitudes towards the use of physical punishment as an effective means of discipline. Before the ban, half of the Swedish population regarded corporal punishment as a natural and necessary practice of child-rearing.³⁷ It is anticipated that banning corporal punishment through the law will create a social norm that good parents do not employ corporal punishment. Changing societal attitudes is seen as the first step in eliminating the use of corporal punishment since "support for corporal punishment is a primary predictor of its use."³⁸

Secondly, the ban is to establish clear guidelines for parents, professionals, and the general public that all forms of physical punishment are prohibited under the law. This would end the debate over whether or not corporal punishment is permitted. Professionals such as nurses, social workers, teachers now have the ability to inform parents that physical punishment is no longer permitted. This enables professionals to detect parents who are at risk of endangering their children at an early stage. Also, it is assumed that the new law will encourage individuals who witness children being exposed to physical harm, to report it promptly, thus leading to an earlier detection and prevention

³⁶ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of Countries that Accord Children Full Legal Protection from Physical Punishment, 18.

³⁷ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment* (London: Save the Children, 2000), 9.

³⁸ *Ibid.*, 10.

of child abuse.³⁹

Finally, the ban is to facilitate early, but less intrusive, intervention into families. Since all types of physical punishment are prohibited, professionals feel more at ease recommending alternative disciplinary techniques, providing support as well as educational information to parents.⁴⁰ Even in cases of mild physical punishment, professionals can now offer material regarding alternatives without feeling they are being intrusive into family affairs, since the purpose of the ban is to educate parents, not to punish. Early intervention is important; it has two aims: (a) to decrease the rate of child abuse, and (b) to implement more proactive measures to help protect children from harm.

In the past thirty years, research indicates that some of the ban's objectives have been met. The Swedish Opinion Research Institute and Statistics Sweden have repeatedly conducted national opinion polls since the mid-1960's, which are based on large, national representative samples. The polls indicate that support for corporal punishment has declined considerably over the last thirty years. In 1965, eight years after the Penal Code's defence permitting corporal punishment was repealed, one-half of the population perceived corporal punishment as essential for child-rearing; by 1981, this proportion decreased by 50%⁴¹, and in 1994, it was revealed that only eleven percent of the Swedish population support the use of corporal punishment, even its mildest forms.⁴²

The change in public attitudes towards corporal punishment appears to reveal a generational effect. Persons over the age of fifty are three times more likely to support the

³⁹ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment* (London: Save the Children, 2000), 8.

⁴⁰ *Ibid.*, 8.

⁴¹ Joan Durrant, "Evaluating The Success of Sweden's Corporal Punishment Ban," 439.

⁴² Joan Durrant, *The Swedish Ban on Corporal Punishment: Its History and Effects*, 23.

use of physical punishment than those under the age of thirty-five⁴³. Further, gender and educational levels seem to have an impact on public attitudes towards corporal punishment. Men are almost three times as likely to support its use (16 %) as women (6%), and persons with only an elementary school education (18%) as those with a University education (4%)”.⁴⁴

A decline in support for corporal punishment could have possibly contributed to a reduction in its use and severity. Although no longitudinal studies on corporal punishment use have been conducted, findings from various cross-sectional studies suggest the use of physical punishment has declined over the last forty years. Research conducted in the 1950's and early 60's revealed the use of corporal punishment was a common practice. More than 90% of mothers in a Swedish sample used corporal punishment against their pre-school children during that time period. Research conducted in 1990 showed that only a fifth of the child population was subjected to corporal punishment.⁴⁵ Also, parental interviews conducted in 1980 and 2000 reflect this trend of the decline in physical punishment: “Only 8.3 per cent of parents in 2000 stated having used any form of physical punishment in the last year, compared with 51.3 per cent in 1980”.⁴⁶ Also, a survey completed by 1800 school children indicated that 83 per cent have never been subjected to corporal punishment by their parents. Furthermore, a recent study conducted on a randomly-selected group of Swedish mothers who have middle age school children were asked about their personal attitudes towards spanking. The study

⁴³ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment*, 9.

⁴⁴ Joan Durrant, “Evaluating The Success of Sweden's Corporal Punishment Ban,” 439

⁴⁵ Rowan Boyson, “Equal Protection for Children : An Overview of the experience of Countries that accord children full legal protection from physical punishment, 18.

⁴⁶ *Ibid.*, 18.

revealed that a large majority of the mothers regarded spanking as unnecessary and harmful (81%) plus ineffective (almost 90%).⁴⁷

Although the above research indicates a decline in the use of corporal punishment, this information must be approached with scepticism since very few studies reveal parental attitudes in Sweden when the new law was enacted, and also the findings are based on personal interviews with parents. It could be argued parents refrain from admitting using corporal punishment against their children due to the existence of the law. However, this is debatable since Sweden's present ban does not attach criminal sanctions, unless assault has been committed. In addition, some research has indicated the use of corporal punishment by parents has not altered significantly. One survey revealed that "32 % of middle-schoolers (born after the law, between 1979 to 1982) reported being physically punished at least once by their father, compared to 34% of young adults (born from 1960 to 1977), 40% of middle aged adults (1940 to 1960) and 46% of older adults (1920 to 1940)".⁴⁸ In addition, corporal punishment in Sweden has not been completely eliminated. Those who did were mostly subjected to the mildest form, such as arm grabbing and mild slaps. Only 3 per cent of the middle age school children surveyed stated they received harsh slaps while 1 per cent were disciplined with an object.⁴⁹

Encouraging the public to take assaults against children seriously and to protect them from risk by reporting suspicious cases of harm appears to be successful. Reports filed to police regarding assaults committed against children, between the ages 0 to 6,

⁴⁷ Joan Durrant, Linda Rose Krasnor and Andres G. Broberg, "Physical Punishment and Maternal Beliefs in Sweden and Canada, *Journal of Comparative Family Studies* 34, no. 4 (2003): 595.

⁴⁸ Robert E. Larzelere and Byron Johnson, "Evaluations of the Effects of Sweden's Spanking Ban on Physical Child Abuse Rates: A Literature Review", *Psychological Reports* 85 (1999): 388.

⁴⁹ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment*, 10.

increased from 99 in 1981 to 584 in 1994.⁵⁰ It is difficult to determine if reports mainly deal with parents since official statistics encompass all individuals over the age of 15 who committed an assault against a child. Reasons for increase in reporting could include numerous factors: change in reporting mechanism, record of reporting, actual increase in incidences, and a stronger willingness to report suspected cases as a result of greater public awareness of child abuse.

Regardless, an overwhelming majority of reported assaults against children (averaging 92 per cent) between 1981-1996 constituted trivial or common offences, which could imply the identification of children at risk is taking place before serious injuries occur.⁵¹ Also, the reports of serious assaults did not increase during that time frame.

An increase in reporting rates does not necessary mean the actual rate of child abuse has risen. Public awareness of child abuse is likely to result in an increase of reports, regardless if the rate of child abuse remains the same, increases or decreases. Future research is needed to determine whether the increase in reporting reflects an actual increase in the rate of child abuse or is due to an increase in public awareness. Most importantly, since few studies have been conducted on evaluating the effects the ban has on child abuse, more research is essential. As of now, no evidence proves that the ban has decreased the rate of child abuse.⁵²

The final objective of the ban, which was to facilitate a more supportive and

⁵⁰ Rowan Boyson, "Equal Protection for Children : An Overview of the experience of Countries that Accord Children Full Legal Protection from Physical Punishment, 19.

⁵¹ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment*, 11.

⁵² Robert E. Larzelere and Byron Johnson, "Evaluations of the Effects of Sweden's Spanking Ban on Physical Child Abuse Rates: A Literature Review".

preventive child welfare system while reducing compulsion, appears to be successful. Sweden's social services offers both voluntary and compulsory services to families at risk, and recent statistics reveal the implementation of voluntary measures is increasing while compulsory ones are declining. For example, "in every year between 1982 and 1995, the majority of measures have been of a voluntary nature; in 1995, few than 20% of measures were implemented without parental consent".⁵³

Aside from appearing to have met certain objectives, the ban could reveal that the critics of the law were wrong. Opponents claimed children would become uncontrollable, leading to an increase in youth crime. Also, parents would be prosecuted at a high rate. Examining Sweden's present situation reveals neither has happened. Finding from surveys show that young people's consumption of alcohol and drugs has declined since the ban. Statistics also reveal that an increase in youth crime has not occurred: "Crime statistics indicate that, rather than increasing, the number of 15 to 17 year olds found guilty of criminal offences remained steady between 1983-1996".⁵⁴ In fact, certain types of offences have declined, such as theft, narcotics possession and trafficking, and rape. Although reports of assaults by youth committed against peers have increased, research indicates this is largely due to anti-bullying campaigns and the schools' adoption of a zero tolerance policies. Finally, Sweden's ban has not resulted in an increase in prosecution against parents nor others who employ minor assaults.

Although it appears some of the ban's key objectives were met and additional positive effects evolved, no direct causal relationship can be made between the ban and

⁵³ Joan Durrant, "Evaluating The Success of Sweden's Corporal Punishment Ban," 443.

⁵⁴ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment*, 21.

the effects outlined above.⁵⁵ Multitude factors shape society; therefore, the examination of Sweden's broader social context is required. Sweden's culture is based on the principles of collectivism and egalitarianism, which encompass the promotion and protection of children's rights. Under this collectivist approach, the basic assumption is that the state and family work in partnership to achieve the family's well-being.⁵⁶

A collectivist approach to Sweden's public policies dates back to the 1880's. Liberal scholars in the Swedish Parliament admired the movement towards social democracy in Germany, and recommended the government provide economic security to all citizens, not just the poor. Extending the collectivist model to family policies occurred in the 1930's. Two social scientists, Alva and Gunnar Myrdal, influenced the adoption of a collectivist approach to family policies. Concerned about the low birth rate in Sweden, they proposed reforms to improve the quality of life for families. They advocated that the government should strive harder to provide families with economic security, and offer incentives to couples who decide to have children. The Myrdals' requests were radical for that time, but they did not want the government to promote fertility at the expense of women's rights.⁵⁷ In the mid 1930's, the Swedish government, led by the Social Democratic party, endorsed the Myrdals' ideas, since such views were in line with the party's objectives. By 1940, various policies were implemented to aid families; some measures included providing loans to married couples, granting financial assistance to low-income mothers, offering housing subsidies to large families, and assisting in paying

⁵⁵ Joan Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment*, 27.

⁵⁶ Linda Haas, "Family Policy in Sweden," *Journal of Family and Economic Issues* 17, no. 1 (1996): 51.

⁵⁷ Joan Durrant and Gregg M Olsen, "Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban," 447.

for prenatal care, child birth, and post-natal care. This collectivist approach has been enhanced through additional policies geared towards assisting families, such as health care, parental leave, and the child care system.

Sweden's health care system emphasizes equality, universality and prevention. All citizens are entitled to an adequate health care regardless of ability to pay. Sweden's health care system is noted to be more advanced than other industrial nations, such as Canada. This system does not just offer universal access to health care services, but provides insurance for loss of income as a result of illnesses, and heavily subsidizes the cost of prescription drugs; medication for life threatening illnesses is free.⁵⁸ For children, health care is extensive. Parents have free access to pre and peri-natal care, and from birth to school age, children attend community health clinics for annual check-ups. If a specialist referral and treatment is needed, those services are free. Also, school age children receive medical attention from health care professionals at school. Plus, dental care is free until the age of nineteen; regular check- ups and treatments are covered.

Sweden's health care system, which aims at prevention of illnesses, appears to be successful. Sweden has the lowest child mortality rate in the world (0.5 per cent for infants and 0.4 per cent for children under five); also the number of children born with low birth weights is among the lowest in the world (at 5 per cent).⁵⁹

Sweden's parental leave policy is referred to as the most explicit illustration of a collectivist approach. Its paid maternity leave dates back to the 1940's, and was extended to fathers in the 1970's. Presently, parental leave is one year, which can be shared by the parents, at 90 per cent of their wages. This is available to all families. In addition, three

⁵⁸ Joan Durrant and Gregg M Olsen, "Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban," 445.

⁵⁹ Ibid., 452.

months can be taken at a lower rate, while three more months can be taken without wages, but job security is guaranteed.⁶⁰ Fathers are granted ten days of leave at 75 per cent of their wages immediately following the birth of their child. Also, since 1979, parents are permitted to reduce work days by 25 per cent to spend more time with their children, until the youngest child reaches the age of seven. Parental leave does not pertain only to parents with infants or preschoolers. Parents with children under the age of 13 (21 in the case of a disabled child) are eligible to take ninety days off of work while receiving 75 per cent of their wages to care for sick children.⁶¹

Over the past thirty years, the Swedish government has made great strides to ensure that all children in need of day care spaces are provided for. Since 1995, children between the ages of one to six are legally entitled to a day care space, while children between six and twelve years old are eligible for before and after school care if parents are working or attending school. The majority of day care costs are covered by the government: “The government pays most (89%) of the costs of day care centre places for preschool-aged children and 85% of the costs for places in family day care homes”.⁶² Remaining costs are paid by parents; their contribution is determined by level of income. These day care services are highly regulated in terms of staff-child ratio, staff qualifications, facilities design, and standards.

In regard to children’s rights, Sweden has a long history of respect for such rights. Various voluntary agencies, such as Swedish Save the Children and the Swedish Society for the Protection of Children’s Rights in the Community, have been overseeing and

⁶⁰ Joan Durrant and Gregg M Olsen, “Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban,” 452.

⁶¹ Ibid., 453.

⁶² Linda Haas, “Family Policy in Sweden,” 63.

safeguarding children's rights for decades. The government's promotion of children's rights is most evident through the work of these organizations as well as various governmental ones. These organizations, plus the National Child Environment Council, called upon the government to appoint an official Ombudsman for Children.

In 1993, Sweden's first Children's Ombudsman was appointed. Its mandate is to protect and promote the rights and interests of children.⁶³ The Ombudsman's prime responsibility is to monitor Sweden's compliance with the United Nations Convention on the Rights of the Child. Sweden was heavily involved with formulating the Convention and the first country to ratify it. The Ombudsman submits bills for legislative reforms to the government to ensure that new laws take into consideration children's perspectives and rights. Also, the Ombudsman promotes the application of the UN Convention in the work of governmental agencies and municipalities. Moreover, it participates in public debates, promotes public interest regarding key issues and tries to influence policy-makers' decisions.⁶⁴

Children's rights have been addressed through various laws and public policies. One initiative includes taking action to create an environment free of violence. Exposure to violence has been regulated through various means: advertising, retail, films, and television., In 1979, the National Board for Consumer Policies and the National Child Environment Council reached a voluntary agreement with Swedish's toy retailers to stop the sale of toy weapons and other products with military association.⁶⁵ Then, in 1989, an agreement regulating advertising was signed by the above parties, and was later endorsed

⁶³ Linda Haas, "Family Policy in Sweden," 66.

⁶⁴ Sweden Child Ombudsman, About the Ombudsman [<http://www.bo.se/adfinity.aspx?pageid=85>] October 2003.

⁶⁵ Amelia Adamo, "New Rights for Children and Parents in Sweden," Children Today November-December 1981.

by non-toy suppliers, such as computer game manufacturers. This pact prohibits the glorification of violent acts which implies that violence is the means to resolve disputes. Further, the sell and rental of videos comprising “realistic portrayals of violence” to children under the age of 15 is illegal. These measures are taken to eliminate the idea that violence is the means for resolving conflict.⁶⁶

Action has been taken to promote and provide a safe environment for children, which is regarded as a central right they possess. Efforts have been taken to promote child safety in the home and neighbourhoods. In the 1970's a state agency, the National Child Environment Council, was established to promote accident prevention through public education and environment restructuring; such efforts appear to be successful. The Council’s “efforts led to a reduction of 75 per cent in accident fatalities between 1955 and 1992 among children across all types of accidents and all age groups”.⁶⁷ The reduction is largely due to the implementation of national standards for the content and packaging of merchandise which poses risks to children’s safety, such as toys, appliances and toxic substances.

Obstacles to Implementing the Swedish Approach in Canada

Implementing Sweden’s ban on corporal punishment in Canada may pose some difficulty considering Canada’s legal and social context. Canada, unlike Sweden, has not completely endorsed a collectivist approach to family policies, even though certain policies appear to be based on this philosophy. Canada has developed a universal health care system and a parental leave program, but not as extensive as Sweden’s. Also,

⁶⁶ Joan Durrant and Gregg M Olsen, “Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban,” 447.

⁶⁷ Ibid., 448.

Canada, unlike Sweden, does not have an universal daycare program. In Canada, Quebec is the only province that has implemented a universally, accessible and affordable system of child care for its citizens. Under this system, parents pay five dollars a day per child.⁶⁸ Also evidence indicates that an universal child care system is not desired by most Canadians. An Angus Reid poll reveals that seventy-seven per cent of Canadians believe parents and the family, not the government, should have the primary responsibility for providing care to their children.⁶⁹ Other studies disclose that eighty-nine per cent of parents prefer home care as opposed to professional daycare, and if affordable seventy-five per cent of parents would select staying home to raise their children.⁷⁰

In Canada, there is a perception that the family is primarily responsible for raising, educating, and caring for their children. The family is perceived as the institution that makes decisions in their children's best interest, and state intervention is justified only if parents fail to fulfill these responsibilities.⁷¹ This view is clearly illustrated in Canada's law regulating corporal punishment. The state becomes involved with family affairs only if parents are charged with assaulting their children. Not only does the law enforce such an idea, the lack of public support for a ban on corporal punishment does as well. A recent survey by Légar Marketing reveals seventy per cent of Canadians oppose a law that would prohibit parents from spanking their children.⁷² More interestingly, only fifty per cent of Canadian parents reported having spanked their children. Therefore, it

⁶⁸ Campaign 2000, Diversity or Disparity? Early Childhood Education and Care in Canada, [<http://www.campaign2000.ca/ci/rep03/CIreport03.pdf>], March 2004.

⁶⁹ The Fraser Institute, Federal Daycare: A Solution in Search of a Problem, [http://oldfraser.lexi.net/publications/forum/2000/03/section_04.html#FN_08] December 2003.

⁷⁰ Ibid.

⁷¹ Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada [2003], Factum of the Respondent Attorney General of Canada, 27.

⁷² Donald McKenzie, "The Right to Spank backed in Poll", Toronto Star, 11 February 2002 [<http://www.corpun.com/cad00202.htm>] October 2003.

appears that many parents do not oppose a ban because they endorse the use of corporal punishment, but because they see such a law as the state interfering with the family.⁷³

The above facts indicate that Canadians are more inclined to view the family as primarily responsible for raising children, and believe that the state has no right to interfere with family affairs, unless parents' actions pose a risk to children. Sweden has endorsed the opposite position. Swedes believe the state should play a vital role in making people's lives better, especially families, and the state is in the position to act in the best interest of people.⁷⁴ Such a view is evident in the fact that Sweden citizens oppose cut backs to social spending in regards to family policies. The early 1990's experienced an economic recession in Sweden. This led to significant cuts in social spending. The public rejected the scaling back of family policies, and various organizations, such as Children's Lobby, were formed to advocate against such cutbacks.⁷⁵ Also, at no time did the government doubt that it should be providing extensive services to families even though some cut backs were made, such as reducing compensation paid for taking care of sick children and for staying home on parental leave: "At the height of the crisis, in December 1992, health and social affairs minister Bengt Westerberg, declared: "Day care is good for children. All children should have the right to a day care place from one year of age".⁷⁶

Swedes do not seem to view collective family policies as the state intruding with the family. However, it is difficult to determine whether the majority of citizens opposed the ban on corporal punishment and/or perceived it as the state interfering in family

⁷³ The Fraser Institute, *Federal Daycare: A Solution in Search of a Problem*.

⁷⁴ Correspondence Joan Durrant, PhD, November 2003.

⁷⁵ Linda Haas, "Family Policy in Sweden," 85.

⁷⁶ *Ibid.*, 82.

affairs. No national polls were taken on public attitudes towards the new law when it was enacted. However, Joan Durrant, an expert on Sweden's corporal punishment ban who has spend considerable time interviewing parents, professionals and members of the committee that introduced the ban, stated the law was not controversial. Only a small minority rejected the law. Also, she stated "Swedes don't have those ideas of state intrusion or parents rights"⁷⁷.

In Canada, this is not the case. Certain groups and individuals oppose a ban on corporal punishment on the grounds that it is an infringement of the rights of the family and parents and should not be imposed. Various organizations have publicly argued against such as ban: the Focus on the Family, Home School Legal Defence Association of Canada, REAL Women of Canada, and the Canada Family Action Coalition. These groups have acted as interveners in the recent court case dealing with the constitutionality of Section 43. The case was heard in June 2003 by the Supreme Court of Canada, but has not made a ruling yet. Besides these groups, the Federal government endorses this view of minimum state interference into the family. Roslyn Levine, a lawyer for the Department of Justice, claims "parents need a certain limited autonomy in raising their children free of state interference, as long as their disciplinary methods do not cross the line and become abusive".⁷⁸ Hence, it appears there is a difference in opinion between the two countries in regard to the state's role in the family.

Canada's legal context could pose additional difficulty for the enactment of a ban on corporal punishment. Each country has its own definition of assault. Canada's

⁷⁷ Correspondence, Joan Durrant, PhD, November 2003.

⁷⁸ Group Asks to Outlaw Spanking, Globe and Mail 6 June 2003

[<http://www.globeandmail.com/servlet/story/RTGAM.20030606.wspank0606/BNStory/National/>] June 2003.

definition is fairly broad compared to Sweden's. Section 265 of the *Canadian Criminal Code* defines assault as "the intentional application of force to another person directly or indirectly, without that person's consent".⁷⁹ It can be interpreted that all unwanted force is assault. Section 43 is necessary to prevent parents from being criminally prosecuted for spanking or using other forms of physical force, such as grabbing an unruly teenager by the shoulders or putting a difficult toddler in a car seat.⁸⁰ For Sweden, this is not the case. Its assault definition is more clearly defined. Under Sweden's *Penal Code*, for an act to be classified as an assault it requires the infliction of bodily harm or pain of more than a temporary duration. Parents who administered mild spanking or use physical force to restrain a child to prevent injury to oneself are not subjected to criminal sanctions, unless bodily harm is inflicted.

Although Canada's legal and social context differs from Sweden's, that does not mean that Sweden's approach should be disregarded. Examining Sweden's collectivist approach reveals that such a model has the potential to address key problems that arise in the liberal view of the parent-child relationship. The collectivist approach aids in eliminating the notion that children are second class citizens, a message that is often conveyed under the liberal approach. The collectivist approach places great emphasis on respecting and implementing children's rights than the liberal paradigm does. Sweden's law prohibiting corporal punishment displays this commitment. Since children can no longer be subjected to physical force for corrective purposes, they are now granted the same protection under the law that adults receive. Thus, children are treated as equals, not second class citizens.

⁷⁹ Canadian Foundation For Children, Youth and the Law .v. Attorney General of Canada [2003], Factum of the Respondent Attorney General of Canada, 20.

⁸⁰ Ibid., 27.

Equally important, the collectivist approach addresses the issue of parents possessing too much authority over their children, which occurs under the liberal paradigm. The collectivist approach does not perceive parents as being solely responsible for their children's well-being and education. It considers that such an obligation falls upon both parents and the state, thereby limiting parental control over children. This approach is beneficial. It rejects the notion that parents always act in the best interest of the child. This is important since the examination of some court cases makes it evident that parents do not always act in their child's best interest nor know how to do so

Even though the collectivist approach addresses key issues of the liberal paradigm, it needs to be approached with scepticism. It presents its own problems. The collectivist approach does not eliminate extensive authority over children; it simply takes some power away from parents and grants it to the state. Instead of assuming parents act in the best interest of their children, there is now an assumption the state will. However, is there any guarantee that the state will act in the best interest of children or even know how to?

Instead of adopting Sweden's approach, the Canadian government has decided to address the issue of corporal punishment through an educational approach. Canada's educational approach is discussed in the next chapter.

CHAPTER FOUR

CANADIAN GOVERNMENT'S EDUCATIONAL INITIATIVES AND THEIR EFFECTIVENESS

The Canadian government has decided to address the issue of corporal punishment through educational measures rather than using legal means. The federal government supports two programs that are designed to assist parents: Nobody's Perfect and the Community Action Plan for Children (CAPC). This chapter outlines these educational programs, and makes specific reference to their strengths and weaknesses. By examining the programs' deficiencies, it is evident that the programs, like S.43, are grounded on the liberal paradigm of the parent-child relationship.

Amendments to laws do not necessarily alter public attitudes and behaviour. Even if the Canadian government outlaws corporal punishment of children, parents may still use it to discipline their children. For example, in countries where corporal punishment is prohibited, such as Finland and Sweden, some parents continue to use physical punishment. However, it is difficult to determine the extent to which corporal punishment is used due to lack of research as well as the unreliability of survey data.¹

Altering parental behaviour and attitudes may require education, such as teaching them to control their emotions, such as frustration. In the court cases examined, most of the parents did not want to use physical punishment against their children. This is evident since nearly all parents attempted alternatives first, such as discussing the incident with the child, time outs and groundings, but had no success. Parents claimed they were frustrated with their child's continuous defiant behaviour, and felt they had no choice but

¹ Rowan Boyson, *Equal Protection for Children : An Overview of the experience of countries that accord children full legal protection from physical punishment*, Edited by Lucy Thorpe (UK: NSPCC), 38. [<http://www.nspcc.org.uk/inform/downloads/EqualProtectionForChildren.pdf>]. November 2003.

to employ force in order to control the children's behaviour and to teach them it was inappropriate. Parents did not know what else to do, so resorted to corporal punishment.²

There are reasons to speculate that education is successful in altering parents' attitudes and behaviour regarding the use of corporal punishment. Research suggests that in countries where legislative reform is accompanied by educational programs there has been a shift in attitudes and practices towards the use of corporal punishment. Sweden is a prime example. It is noted for implementing the most extensive educational program to accompany its legislative ban on corporal punishment. Information pertaining to the new law was placed on milk cartons, and a brochure outlining the new law, its purpose and alternatives to corporal punishment was distributed to all families with young children. Also, research indicates that support for the use of corporal punishment has declined since the implementation of Sweden's new law and its educational campaign.

Although it appears educational programs have been successful in altering attitudes and the use of corporal punishment in other countries, further research is needed to determine if the ban on corporal punishment and its educational programs are primarily responsible for such effects.

In addition, the examination of certain cases reinforces this idea of education being successful in altering parental practices and attitudes. For example, in *R.v. D.W.* (1995), the father was charged with assaulting his four year old son after slapping him in the face once. The slap left an imprint of the hand on the child's face. On the day of the

² R.v. B.(R.), [2000] O.J. No 1954 (QL); R.v. Peterson, [1995] O.J. No. 1366 (QL); R.v. Serack, [1994] 159 A.R. 392; R.v. Dupperon, [1984] 16 C.C.C. 3(d) 453 ; R.v. Yaholnitsky, [1992] 123 A.R. 151; R.v. Bielenik, [1999] O.J. No. 4104; R.v. M. (R.W.), [1995] 103 C.C.C. (3d) 375; R.v. Pickard, [1995] B.C.J. No. 2861 (QL); R.v. Burtt, [1986] 75 N.B. R. (2d) 259; R.v. Robinson, [1986] Y.J. No. 99; R.v. Fritz, [1987] 55 Sask. R. 302; R.v. Wheeler, [1990] Y.J. No. 191 p. 3;); R.v.D.W., [1995] A.J. No. 905; R.v.Bell, [2001] O.J. No. 1820; R.v. James, [1998] O.J. No. 1438; R.v. O.J., [1996] O.J. No. 647; R.v. B.(H), [1998] 201 N. B. R (2d) 315; R. v. W.A., [2003] 174 Man. R (2d) 240.

incident, the accused's wife and child were having an argument over the child's refusal to eat lunch. The argument became loud, and woke the accused who was downstairs trying to get some sleep because he had to work the night shift. He came upstairs to see what the commotion was. He asked the child to be quiet and then returned downstairs to get some rest. The child did not listen and continued to scream at his mother. Once again, the father came up to ask the child to behave. The father sat the boy down and instructed him to be quiet. This had no effect on the child's behaviour and the child continued to yell. The father said this was enough and slapped the boy once. After the father administered the slap, he stated he hated himself and agreed he was frustrated. The father immediately apologized. After the incident occurred, the family was referred by a social worker to the Salvation Army Children's Village school, which is a special school for children who need special attention. Also, the family received counseling from the school. The accused claimed he now knows slapping the child is not appropriate: "He agreed though with the Crown prosecutor, in light of the subsequent information that he has now received, that slapping was not appropriate."³ The accused was acquitted by the judge since the force was used for corrective purpose and not deemed unreasonable.

Since it appears education has the potential to alter attitudes and practices, the examination of the educational programs that the Canadian government support is required.

The federal government explicitly states that it does not support nor advocate the use of corporal punishment of children. However, it refuses to repeal Section 43 of the *Criminal Code*. Instead, the Canadian government has decided to address the issue of corporal punishment through an educational approach. The federal government supports

³ R. v. D. W., [1995] A.J. No.905 (Prov. Ct.) para. 9.

and funds programs that promote child development and well-being, and addresses the needs of children at a higher risk of abuse. These programs consist of the Community Action Program for Children (CAPC) and Nobody's Perfect.

In 1990, Canada joined other countries at the United Nations World Summit for Children. There, the Canadian government made the commitment to invest and improve the well-being of children, especially the most vulnerable. Canada reacted with the Child Development Initiative. The Community Action Program for Children (CAPC) is the largest component of that initiative. This program, funded by Health Canada, provides long term funding to community based organizations, which deliver programs that address the health and developmental needs of children between the ages of 0 to 6 who live in conditions of risk.⁴

Prevention is the purpose of CAPC. Its goal is to assist communities in developing services that foster the health and social development of at risk children and families, such services include both educational and intervention activities. Investing in early development will lead to a better start in life, better performance in school, and hopefully enhance children chances of participating fully in society as an adult. CAPC is delivered by community agencies because the program "recognizes that communities have the ability to identify and respond to the needs of children and places a strong emphasis on partnership and community capacity building."⁵

CAPC projects offer parents support and information that is vital for raising children. Services include family resource centres, parenting classes and training, home visits, one-on-one child development intervention, nutrition, counselling, moms and tots

⁴ Health Canada, Community Action Program for Children: About the Program, [http://www.hc-sc.gc.ca/dca-dea/programs-mes/capc_goals_e.html#what], July 2003.

⁵ Ibid.

programs, collective kitchens, traditional aboriginal healing programs and parent/child groups.⁶ These services are delivered to various families: “children living in low-income families; children living in teenage-parent families; children experiencing developmental delays, social, emotional, and behavioural problems; and abused and neglected children.”⁷ Also, considerable attention is given to Métis, Inuit, and off-reserve First Nation children, refugee children, and children living in single parent families, as well as children living in isolated and remote areas of the country.

For 2001-2002 CAPC’s budget was \$59.5 million; \$52.9 million of that was given directly to communities. Out of the budget, each province/territory receives \$500,000 per year for a major project of significant intervention. Remaining funds are distributed on the basis of the number of children between the ages of 0 to 6 living in each province/territory. CAPC’s projects are grounded on six principles: children first, equity and accessibility, community based, strengthening and supporting families, flexibility and partnership.⁸ As of September 1999, there were 499 projects across Canada delivering 1,904 programs in cities, towns, and isolated regions in every province and territory.⁹

Administrative protocols, signed at the Ministerial level, govern CAPC. These protocols identify funding priorities, and establish terms and guidelines for managing projects in each province and territory. CAPC is managed by Joint Management Committees (JMCs). These committees are composed of representatives from Health Canada’s regional offices, from provincial and territorial governments, and from

⁶ Health Canada, Community Action Program for Children: About the Program

⁷ Ibid.

⁸ Ibid

⁹ Health Canada, CAPC/CPNP Renewal 2000 Final Report (Ottawa: Childhood & Youth Division Health Canada, 2001), [http://www.hc-sc.gc.ca/dca-dea/publications/pdf/renewal_final_report_e.pdf] December 2003.

community organizations. Joint Management Committees review individual funding proposals, determine provincial/territorial needs and how funds should be distributed. In a typical application process, a community agency or coalition of agencies in a specific community or province identify gaps in services provided to young children living in at risk conditions. If the community agency or coalition's proposal is approved by the Joint Management Committee, funding is provided for their proposed project.¹⁰

CAPC projects tend to vary from province to province, and can also vary within a province. Variation among provinces and communities is permitted since the goal of CAPC is to assist communities in developing services that improve the health and well-being of children and families. For example, in Cape Breton, Nova Scotia, CAPC funds four family resource centres across the Island. The goal of this project is to reduce the risks to young children and their families since in this area services and resources for families are limited. These resource centres offer various services, such as group and drop-in play, and parenting educational sessions¹¹. Regardless of the CAPC project, the overall principles and goals of CAPC projects are similar. CAPC is delivered through Health Canada regional offices, and program consultants offer guidance and support to projects in their provinces/territory to ensure accountability.

Although funding for CAPC programs are ongoing, all projects are subjected to a formal review when existing contribution agreements end and projects re-apply for funding. This process is known as Renewal. Renewals are important; they provide Health Canada with insightful information regarding the projects supported, their successes and

¹⁰ Michael H. Boyle and Douglas J. Willms, "Impact Evaluation of a National, Community-Based Programs for At-Risk Children in Canada," *Canadian Public Policy* 28, no. 3 (2002), 462.

¹¹ Health Canada, *Community Action Program for Children: Cape Breton Family Resource Coalition*, [<http://www.ssjs.hc-sc.gc.ca/capc/search.htm>], March 2004.

challenges. Each Health Canada regional office is responsible for producing its own Renewal Report. Then a national summary of the regional reports is compiled. This report outlines the common issues and themes CPAC projects are facing.¹²

During the Renewal process, various factors are considered, such as is the project (a) meeting the needs of its target population; (b) adhering to the guidelines established by the Joint Management Committees; (c) based on CAPC's underlying principles and (d) effective.¹³ Past renewals reveal CAPC has both successes and challenges. CAPC projects have been successful at adhering to its guiding principles, forming and maintaining partnerships with various organizations and sectors: child welfare, education, public health, and small businesses. Partnerships are beneficial. They lead to increase referral services and resources for participants. Also, CAPC projects have been successful in reaching the most vulnerable members of society. For example, "in Manitoba, 74.4% of participants have incomes of less than \$15,000 per year".¹⁴

Accessibility to CAPC's programs is noted as a challenge. Transportation is the most significant factor preventing parents and families from participating in CAPC programs. However, some projects have been working on strategies to overcome this barrier: providing taxi fares, having staff members and volunteers picking participants up, and arranging home visits. Inadequate funding is another obstacle for CAPC programs. Projects with sufficient financial resources appear to be successful, while maintaining high quality programs on fixed budgets and resources poses difficulty. These projects start to rust out. Also, projects offered in rural, remote, and isolated areas face numerous obstacles: transportation issues, developing partnerships and the difficulty of maintaining

¹² Health Canada, CAPC/CPNP Renewal 2000 Final Report,

¹³ Ibid.

¹⁴ Ibid.

high quality staff.¹⁵

Nobody's Perfect is the other program that the Canadian government supports. This program is a parent education and support program for parents with children five years old and younger. It aims to meet the needs of parents who are young, single, socially or geographically isolated and also who have low incomes, and/or limited education¹. Participation is voluntary and free of charge; this program is not designed nor intended for families in crises.

Nobody's Perfect was developed by Health Canada in the early 1980's in partnership with the Atlantic provinces: New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island. Presently, it operates in all provinces/territories and is offered in both urban and rural settings. Nobody's Perfect is implemented through various means: by provincial/territorial governments, integrated into federal programs, such as the Community Action Program for Children (CAPC), or implemented by non-profit organizations.¹⁶ There is no specific budget for Nobody's Perfect. Funding for the continuation of the program comes from various sources: provincial/territorial governments, CAPC funding, Health Canada's regional office funds, community-based agencies' budgets, and financial contributions from community groups.¹⁷

The Canadian government, through Health Canada, provides support to Nobody's Perfect through various means: "maintaining the high quality of program materials through consultation and revision process; ensuring a national materials distribution mechanism through Canadian Government Publishing; providing support for national

¹⁵ Health Canada, CAPC/CPNP Renewal 2000 Final Report,

¹⁶ Correspondence with Roxanne Manning, Nova Scotia's Department of Community Services, March 2004.

¹⁷ Health Canada, Nobody's Perfect: Family and Parenting ,[http://www.hc-sc.gc.ca/dca-dea/family_famille/nobody_e.html], January 2003.

projects such as coordinator's meetings and National Office activities, responding to requests for permission to use, translate or adapt copyrighted material".¹⁸

Nobody's Perfect has five central objectives: (a) to increase participants' knowledge and understanding of their children's health, safety and behaviour; (b) to effect positive change in the behaviour of participants in relation to their children's health, safety and behaviour; (c) to improve participants' confidence and self-image as parents; (d) improve participants coping skills as parents; and (e) to increase self-help and mutual support among parents.¹⁹

The program is offered as a series of six to eight weekly group sessions, made up of eight to ten participants or on a one-to-one basis, or both, and is implemented by trained facilitators. Facilitators come from various community-based family support groups: family resource programs, teen parenting programs, family literacy programs, fathers' programs, and programs for Aboriginal families. Also, Nobody's Perfect sessions are offered in numerous settings, such as child care settings, correctional facilities, schools, shelters, and native friendship centres. Thus, this program brings together people from various fields: health, education, social service, justice, child protection, child care, and immigration.²⁰

Nobody's Perfect is constructed around five colourful, easy to read books that centre around the program's objectives: safety, mind, body, behaviour and parents. These books are provided to parents free of charge. One book pertains explicitly to the issue of disciplining children. It is called "Behaviour". This book states that "no matter how angry

¹⁸ Health Canada, *Nobody's Perfect Today: Summary of Achievements* (Ottawa: Health Canada 2001), 3.

¹⁹ *Ibid.*, 3.

²⁰ *Ibid.*

you are, it is never okay to spank children. It's a bad idea and it does not work". It implies that spanking is an ineffective method of discipline. (Children who are physically punished are likely to behave when parents are present out of fear, but once they leave children tend to misbehave again. Therefore, it does not teach them how and why to behave properly. Also, spanking teaches children that hitting others is an acceptable practice when failing to get what they want. The book's purpose is to offer advice to parents about how to discipline their children effectively without using physical force.) The most appropriate way to handle improper behaviour is to explore and detect the underlying reasons for the child's misbehaviour. Is the child very active, hungry, stressed, tired, not feeling well? If the child is older, try discussing the problem with him/her. Also, the book provides advice on how to deal with common discipline problems, such as biting, crying, whining, fighting, lying, stealing, and tantrums.²¹

During each session, facilitators offer support to participants as they work with one another to discover positive methods of parenting. Nobody's Perfect is founded on the fundamental principles of adult education: "it builds on what parents already know and do for themselves and their children".²² It begins with the parents' own experience, interests and engages participants actively in the learning process. It develops networks between parents and encourages them to look to others as a resource for support and advice.

No national evaluation has been conducted on this program.²³ However, several provincial/territorial evaluations and impact studies reveal that the program is beneficial to families. Recent evaluations conducted (Alberta 1996, Manitoba 1996, Saskatchewan

²¹ Health Canada, Behaviour, (Ottawa: Minister of Public Works and Government Services, 1997)

²² Health Canada, Nobody's Perfect: Family and Parenting,

²³ Correspondence with Laura Stevens, MSW, Health Canada, January 2004.

1997, and Ontario 1999) indicate that the program is effective at reducing isolation, increasing parents' confidence and coping skills, and at increasing parents' knowledge and understanding in regards to their children's development, while altering their behaviour towards their children's safety, health and behaviour. Although the program appears to be successful in addressing the needs of its participants, there are certain obstacles it faces, ones similar to CAPC's, such as funding and transportation issues.²⁴

In addition to these two programs, the Canadian government, through Health Canada, funded a booklet entitled, "Spanking: Should I or Shouldn't I" for parents. The booklet was written by Joan Durrant from the University of Manitoba and Linda Rose-Krasnor from Brock University. It outlines what recent research on spanking reveals. Studies indicate that children who are subjected to physical punishment are inclined to have more behavioural problems compared to children who have not been spanked. Children who are spanked grow up to be aggressive towards other children, and believe hitting others is acceptable. As adults, they are more likely to resolve disputes with spouses, children and neighbours through violence.²⁵ However, it is important to approach these findings with caution since such research fails to prove that corporal punishment is the primary cause for these negative outcomes. The booklet, also, outlines various alternatives to physical punishment that parents can use when disciplining children of all different ages.

In addition to the educational initiatives supported by the Canadian government, provincial governments provide support and services to families. This is important since providing services to families and children fall under provincial jurisdiction. Each

²⁴ Health Canada, *Nobody's Perfect Today: Summary of Achievements*,
²⁵ Joan Durrant & Linda Rose-Krasnor, *Spanking: Should I or Shouldn't I?* (Ottawa: Health Canada, 1998).

province designs and implements their own services and programs to ensure that the needs of their citizens are being met.

In Nova Scotia, the provincial government provides educational support and services to parents by funding family resource centres. These centres are in addition to the ones funded by CAPC. Some family resource centres receive core funding from the province, while others obtain only project funding. Project funding is granted to family resource centres that propose projects which are aimed at meeting the provincial government's objectives in regards to family issues, such as promoting healthy development or reducing the risk factors of child abuse. For family resource centres that do not receive core funding from the province, but only project funding, funding to keep the centre going comes from various sources: the Community Action Program for Children (CAPC), corporations, community agencies, and charitable agencies, etc.

Nova Scotia's family resource centres have key objectives: to provide parenting education programs, such as Nobody's Perfect; to enhance parent-child interaction; and to provide child focus programs, such as group and drop in play.²⁶

Support for family resource centres that are aimed at providing assistance and educational services to families is growing in other provinces. In Ontario, Early Years Centres have been established. The Ontario Early Years Centres are places where parents and caregivers can get answers to their questions about child development, including how to discipline children, and information about services and programs provided to families. Also, these centres offer parents an opportunity to speak with early childhood professionals and other parents. These centres are available to all parents with children up

²⁶ Correspondence with Roxanne Manning, Nova Scotia's Department of Community Services, March 2004.

to and under the age of six. All the services and programs available to parents are free of charge. The centres provide a variety of services: “early learning and literacy programs for parents and children; programs to help parents and caregivers in all aspects of early child development, such as Nobody’s Perfect; programs on pregnancy and parenting; links to other early years programs in the community; and outreach activities so all parents can get involved with their local Ontario Early Years Centre.”²⁷ These centres are staffed by trained early year professionals and volunteers. Training for the staff is provided by the Ministry of Community, Family and Children Services.

Although providing services to families is primarily a provincial responsibility²⁸, both levels of government over the last few years have taken a great interest in ensuring that programs which focus on early childhood development are being provided: “There is growing evidence about how critical the early years are to a child’s development. Canadian governments realise they need to invest wisely in services supporting children during their early years so that these children will be happy, healthy and ready to learn.”²⁹ As a result in 2000, the federal and provincial governments signed a five year investment plan to enhance early childhood development programs and services. Under this agreement, the federal government is providing \$2.2 billion to provincial and territorial governments over a five-year period. The provinces are expected to provide additional funding. This investment is to help provincial and territorial governments improve and

²⁷ Ontario Government, “What is an Ontario Early Years Centre” [<http://www.ontarioearlyyears.ca/oeyc/en/Questions/Whatis.htm>] , March 2004.

²⁸ Given that Canada is a federal system, providing services and programs to families and children fall under provincial jurisdiction. Provincial responsibility in this area can be inferred from specific headings of Section 92 of the BNA Act. For more information on Canada’s federal system and the issues this system poses, please refer to Patrick J. Monahan’s book, “Essentials of Canadian Law: Constitutional Law“, and Keith G. Banting’s book, “ The Welfare State and Canadian Federalism”.

²⁹ Canadian Government, “Early Childhood Development”, [<http://www.hrdc-drhc.gc.ca/common/aneu/document/feedback.shtml>], March 2004.

expand on early childhood development programs and services for children from birth to six.

Benefits of Canada's Educational Approach

The Canadian government should be commended for supporting these programs and the booklet. All three measures have the potential to assist families with addressing the issue of corporal punishment. The primary clientele of these programs is families with young children and with children who are experiencing developmental delays, both physical and emotional. This is important. Research reveals that young children and those with disabilities/developmental delays are more likely to be subjected to corporal punishment compared to other children.³⁰ The examination of corporal punishment cases helps confirm this. In some of the court cases examined, the child who was subjected to corporal punishment was young and experiencing development delays. For example in *R. v. R.P (2000)*., the father was charged and convicted of assaulting his three- and-a-half- year old son who suffered from Fragile X Syndrome. This condition impairs the child's ability to grasps concepts, communicate, and control his behaviour. The incident evolved on the way to the babysitter's. The father claimed he was frustrated with the child's behaviour in the car. He was crying and hitting his little sister. Also, the parents were late and under pressure to attend a social engagement. The child continued to cry and be defiant. The father reacted by throwing the child through the door landing on his stomach. The child was then hung by the foot until his head touched the ground. He was grabbed by the coat and lifted into the air. The child was pushed against the wall and slapped on his head a few times. The judge rejected the accused's argument that his

³⁰ Save the Children Sweden, "Corporal Punishment", [<http://www.rb.se/www/eng/Programme/Exploitationandebuse/Corparalpunishment/>], September 2003.

actions were for corrective purposes. “Rough handling, hanging the child upside down, screaming in his face, forcing him to his knees, and banging him up against the wall, is not rational or detached corrective behaviour.”³¹ Since things appeared to be going better at home, and the parents were using other discipline techniques, such as time outs, they learned from counselors they have been seeing, the judge did not impose a custodial sentence. Instead, the judge placed the accused on probation for twelve months and ordered him to attend an anger management and a parenting course.

Also, these two programs are promising since both mainly deal with families who are experiencing external stresses, such as financial difficulty and single parenting. This is important. Some court cases examined dealt with families suffering from these stresses. For example, in *R.v. Yaholnitsky* (1992), the father stated that at the time of the incident, his business was suffering financial difficulty and he was having marital problems. The father was found guilty of assault after hitting his two daughters several times with the handle of a broken tennis racquet. He hit them on their backside and on the thigh. One daughter suffered bruising from the top of her thigh to the knee, plus a broken finger. The other child suffered similar bruising and a swollen middle knuckle. The incident was brought about after the girls continued to argue with their mother about cleaning their room³².

In other cases, the stresses of single parenting may have contributed to the parent’s rationale for using force. In *R. v. W.A* (2003), a single mother was found guilty of assaulting her three young sons. Whenever the boys acted up, the mother would use the “attitude adjuster” on them. “The attitude adjuster was described as a board with a

³¹ R.v. R.P., [2000], O. J. No. 5250, para. 10.

³² R.v. Yaholnitsky, [1992] 123 A.R. 151.

handle. Its dimensions were 18 inches long, 7 inches wide, and appropriately ½ to one inch thick.”³³ The mother first attempted to use alternatives, such as time outs, or sending the boys to their room. When they failed, she reverted to the attitude adjuster. During the trial, a witness, who was a close friend of the mother and the reporter of the incidents, claimed “ the accused was simply overwhelmed by three young boys, who more often than not, were out of control.”³⁴ Although these external factors do not excuse parental actions, it does shed light on the various issues that affects the parent’s emotional state.

Nobody’s Perfect and Community Action Program for Children have the ability to assist families since both aim at providing parents with information and support aimed at improving parenting skills and confidence in them, so parents will be able to respond to their children’s needs. Also, both programs offer parents an opportunity to access outside resources and form networks, so they can turn to when feeling pressured by life’s stresses. In addition, the booklet, “Behaviour”, used in Nobody’s Perfect, offers valuable information. It provides advice to parents on how to deal with common behavioural problems, such as stealing, lying, biting, fighting, etc.

The Canadian government’s decision to fund the booklet on discipline, ““Spanking: Should I or Shouldn’t I” was a good idea. It provides valuable information on how to discipline children of different ages without resorting to physical punishment. This is important because some parents who use corporal punishment state that they do not know what other methods of discipline to use.

³³ R. v. W.A. ,[2003] 174 Man. R. (2d.) 240 para. 27.

³⁴ Ibid., 24.

Although the above programs appear to be beneficial for families, they are not completely adequate for addressing the issue of corporal punishment. The programs are offered only to families that are considered at risk, such as low-income families, teenage-parent families, single-parent families, and families with children who have emotional, physical and behavioural problems. This is a concern. Not every child who is subjected to corporal punishment comes from these types of families. Some children who are subjected to physical punishment come from well off and educated families. A prime example is the *Peterson* case. In this case, both parents were well educated. The father had a college diploma and a certificate in inventory management, while the mother possessed a Bachelor's degree and a Master's degree in childhood education and was working on a PhD in the field. She had been an elementary teacher for many years. The judges stated that the "parents were responsible, reasonable and caring."³⁵ Refer back to page 32 where a full description of the case appears.

In addition, the programs are inadequate because they pertain only to families with children six years and under. This is an issue. All children, not just those under the age of six misbehave and are subjected to corporal punishment. This was apparent in the court cases examined. A majority of the cases dealt with children over the age of six, especially teenagers. For example, in *R. v. M. (R.M.)*, [1995], the accused was charged and convicted of assaulting his thirteen year old daughter. Refer back to pages 51-52 where a full description of the case appears.

Due to the fact that these programs apply only to families with young children and at risk families, they fail to adequately address the issue of corporal punishment. If the

³⁵ R.v. Peterson, [1995] O.J. No. 1366 (QL).

federal government is truly committed to addressing the issue of corporal punishment, it must offer these programs to all types of families since all children, regardless of their age nor family situation, can be at risk of being subjected to physical punishment.

In addition, because parents in the majority of the court cases reported that they first attempted alternatives, such as discussing the incident with the child, groundings, time outs, but they failed, programs, booklets and brochures can not just focus on providing information about alternatives to physical punishment. More time needs to be spent on educating parents about how to deal with difficult children and managing their frustration, since in the cases examined a majority of the parents claimed they were frustrated with their child's behaviour. Also, time should be spent on educating parents how to administer alternatives effectively. Finally, since all families deal with the issue of disciplining children, informational brochures and programs about how to discipline children effectively without using corporal punishment should be provided to all types of families.

Even though the above recommendations may assist in making the federal government's educational programs more effective, issues continue to linger. The Canadian government's educational approach pertaining to the issue of corporal punishment is grounded on the liberal paradigm of the parent-child relationship. The Nobody's Perfect program and the Community Action Plan for Children (CAPC) are based on the liberal paradigm's assumption that most parents know how to and will act in the best interest of their children, which is a concern since the examination of the court cases reveals parents do not always do so. These educational programs are only available to a select group of parents; those facing difficult conditions, such as financial

difficulties, young parents, and low levels of education. It is believed such circumstances “can make it hard for parents to give their children the best possible start in life.”³⁶

Providing additional support and information to these parents will aid them in their efforts to raise happy and healthy children. Therefore, the educational programs are designed to “build on parents’ strengths and address the challenges they face”.³⁷

The fact that these educational programs operate within a society that continues to permit parents to use corporal punishment also reveals that these initiatives are designed around the liberal paradigm of the parent-child relationship. It sends a clear message that parents possess authority over their children and it is ultimately up to them to decide how to discipline their children. Another issue regarding these educational programs is that they are voluntary. Since these educational programs are not mandatory, there is no guarantee parents will participate if given the opportunity nor read or act accordingly to the advice provided by the federal government’s educational programs. The educational programs promote the idea that parents should not use corporal punishment when disciplining children, but use alternatives, such as time outs, groundings and discussions. This is important since according to the theorists and the federal government, education appears to be the means for producing law abiding citizens. It teaches children how to use their reasoning abilities to make good judgements, plus why it is important to comply with social norms and laws. Physical discipline, it is believed, teaches children that the use of force is how disputes are resolved and that hitting others is an acceptable means to achieve one’s goal. This view is contrary to how we want and expect citizens to behave. Children who do not understand why obeying laws are important threaten social stability.

³⁶ Health Canada, Community Action Program for Children: About the Program,
³⁷ Ibid.

CONCLUSION

Canada's law on corporal punishment illustrates that the federal government endorses the liberal paradigm of the parent-child relationship. Section 43 of the *Canadian Criminal Code* grants a legal defence to parents who use corporal punishment against their children if the force is for corrective purposes and reasonable under the circumstances. This defence is necessary. The assault provision under the *Criminal Code* is broadly defined. Without Section 43 a parent could be charged with assault against their child if they administer corporal punishment. Both the federal government and the Supreme Court of Canada believe this law is essential for keeping the family together and to prevent state intrusion into family affairs. They feel that such intervention could have severe effects on the family, such as the breakdown of the family. This view was explicitly made known in the Supreme Court's recent decision on the constitutionality of S.43. The Supreme Court of Canada ruled, "the decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families— a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process"¹.

The fear that state intervention will have negative effects on the family is a valid concern. Past court cases reveal that charging parents with assault can be damaging for families. Such action could lead to emotional harm to the child as a result of having to testify against their parents or being separated from them, which occurred in the *James* case (1998). In that particular case, the father was not allowed to have contact with his son for approximately six months. In the end, the father was acquitted since the judge

¹ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* , 2004 SCC 4 para. 62 .

believed the force used was for corrective purposes and not excessive. Even though the father was acquitted, the effects of the incident were far from over. The family had to begin to rebuild the relationships that were broken as a result of state intervention.

The Canadian government's refusal to repeal Section 43 from the *Criminal Code* makes it evident that the law on corporal punishment is founded on the liberal paradigm of the parent-child relationship. Section 43 gives parents the authority to raise and educate their children as they see fit. State intervention occurs only in situations where the parents negate their responsibilities and abuse power. Thus, there is an assumption that parents will act in the best interest of their children. This is a grave concern. Past court cases reveal that not all parents act in the best interest of their children. Children in various court cases have been exposed to harm in the name of discipline, even in cases where parents received an acquittal. For example, children have been hit with belts, rulers, extension cords, etc which resulted in extensive bruising. Exposure to such harm may be alleviated. The Supreme Court recently ruled that it is no longer acceptable to use an object when disciplining children, such as belts, rulers, or to strike a child in the face or on the head. The Court also ruled out the use of corporal punishment for children under two and for teenagers.² This decision is based on social science evidence presented to the Court. This evidence reveals that force against a child under two can be harmful and can not be corrective. A child at that age is incapable of understanding why they are being hit. In regards to teenagers, the evidence implies that corporal punishment can induce aggressive or anti-social behaviour.³

² *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC

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³ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC

4.

In addition, the law on corporal punishment reflects the notion that children are second class citizens and denies them the rights and freedoms adults possess. Children are the only group of citizens in Canada who can be legally subjected to force. Section 43 of the *Criminal Code* permits an act against children that would be criminal if committed against an adult. Thus, the law of corporal punishment denies children the same protection and rights adults receive under the law. Also, children are prevented from governing themselves like other citizens and parents possess extensive control over them. This raises an issue. Societies based on liberal principles, such as Canada, should be committed to equality for all members and individual autonomy.

The issues that the liberal paradigm of the parent-child relationship raise need to be examined against the fact that children are dependent on their parents during childhood. They do not possess the abilities adults do, such as the ability to reason. Children do not understand that their actions affect others, nor why certain acts are prohibited. Children have certain desires, such as the desire to do as one pleases, and want to act on them. Due to this, children are unable to govern themselves and denied the rights and freedoms adults possess. Therefore, parents need to have control over their children, so they can curb their children's desires and teach them how and why to conform to social norms.

Recently, certain groups have been criticizing the law on corporal punishment and demanding that the Canadian government follow in the footsteps of other countries, most notably Sweden, and prohibit corporal punishment of children.

Sweden's law banning corporal punishment against children has an educational purpose. This is evident in the fact that the prohibition of physical punishment is written

into the Parents' Code, not the Penal Code and is unaccompanied by criminal sanctions. Therefore, parents will not be prosecuted for using mild forms of physical punishment, such as spanking. They will be charged only if parental actions meet the criteria of assault. Under Sweden's penal code, for an act to be classified as an assault it requires the infliction of bodily harm or pain for more than a temporary duration. Sweden's definition of assault is more clearly defined than Canada's. In Canada, assault is defined as "the intentional application of force to another person directly or indirectly, without that person's consent"⁴. Therefore, it could be interpreted that all unwanted force is assault, which is a reason why the Canadian government refuses to repeal Section 43 of the *Criminal Code*. The Canadian government believes S.43 is necessary to prevent parents from being criminally prosecuted for using mild forms of discipline, such as spanking or other forms of physical force, such as restraining an unruly teenager .

To understand Sweden's rationale for banning corporal punishment against children, even by parents, the examination of Sweden's broader social context is required. Sweden's culture is based upon the principle of collectivism. Under the collectivist approach, there is a basic assumption that the state and the family should work in partnership to achieve family well-being. Thus, it is just not parents who play an active role in providing for children, but the state as well. Sweden's laws and policies that pertain to the family are based on this model, such as health care, parental leave, and child care.

Sweden's collectivist approach is worth exploring. It has the potential to address the issues that arise in the liberal paradigm of the parent-child relationship. The

⁴ *Canadian Foundation For Children, Youth and the Law v. Attorney General of Canada* [2003], Factum of the Respondent Attorney General of Canada, 20.

collectivist approach helps eliminate the perception that children are second class citizens, a message conveyed in the liberal paradigm. The collectivist approach places great emphasis on respecting and implementing children's rights. Sweden's ban on corporal punishment displays this commitment. Children can no longer be subjected to physical force. As a result, they are granted the same protection under the law as adults, thus treating them as equals. Also, Sweden's collectivist approach helps address the liberal view that parents possess extensive authority over their children with minimum state intervention. Under the collectivist approach, the state is viewed as having an active role to play in children's well-being. Therefore, state intervention occurs more often. This limits parental authority and the assumption that parents act in the best interest of their children.

Although the collectivist approach addresses some problems that arise in the liberal paradigm of the parent-child relationship, this approach needs to be subjected to scepticism. The collectivist approach does not eliminate extensive authority over children; it simply shifts some power away from parents and grants it to the state. Instead of assuming parents act in the best interest of their children, there is now an assumption the state will. But will the state act in the best interest of children or even know how to?

The Canadian government has decided to address the issue of corporal punishment through an educational approach rather than a legal one. The federal government supports two parenting programs: Nobody's Perfect and the Community Action Program for Children. Various parenting issues are covered in the programs; disciplining children is one area. Materials provided by the federal government emphasize that spanking is not okay; it is a bad idea and ineffective. The information

provided offers parents advice on how to effectively discipline children without using force.

These educational programs are beneficial. The primary clientele of both programs consists of families with young children and children suffering from developmental delays. Research indicates that young children and those experiencing developmental delays are more inclined to be subjected to physical discipline compared to other children⁵. The examination of the court cases implies that there is truth to this. Numerous court cases dealt with young children and those experiencing mental or physical delays. Also, these programs are promising since the families they deal with tend to experience external stresses: financial difficulty, single parenting, etc. Interestingly, various court cases dealt with parents in similar situations. These programs have the ability to assist families since they offer information and support to help improve parenting skills and confidence. Additionally, they provide parents with an opportunity to access resources and develop networks that they can resort to when feeling pressured.

Although the educational programs have the potential to address the issue of corporal punishment, they do not adequately deal with it. These programs provide advice to families only with young children and those experiencing additional stresses. However, these families are not the only ones to use corporal punishment. Court cases reveal various types of families employ corporal punishment as a disciplinary technique: well-off families, educated families, families with older children, etc. Thus, this is one reason why the programs are inadequate.

⁵ Save the Children Sweden, "Corporal Punishment," [<http://www.rb.se/www/eng/Programme/Exploitationandebuse/Corparalpunishment/>], September 2003.

The educational programs are founded on this liberal paradigm of the parent-child relationship. They assume parents will and know how to act in the best interest of their children. This is evident in the fact that the programs are provided to a select group of families, those facing economic difficulties, young parents, etc. The programs are based on the notion that parents will act in their children's best interest, but external factors may prevent them from fulfilling their obligations. If additional support is provided, parents will be able to raise and educate their children to become productive citizens.

Furthermore, these educational programs operate in a society that permits parents to use corporal punishment. This sends the message that parents possess extensive authority over their children, and it is up to them to decide how to discipline their children. These programs are voluntary. Therefore, there is no guarantee parents will participate in the programs, if given the opportunity, nor read or act accordingly to the advice provided by the federal government. The federal government states that corporal punishment should not be used when disciplining children, but alternatives, such as groundings and time outs.

The Canadian government, like the three political theorists, believes corporal punishment is not the means for producing productive citizens, education is. Parents need to teach children how to use their reasoning abilities. Physical punishment teaches children that force is how disputes are resolved and that hitting others is acceptable means to achieve one's goal. This view is contrary to how society wants and expects children to act.

Examining the material presented in this thesis reveals that the Canadian government endorses the liberal paradigm of the parent-child relationship and that such a

view raises concerns.

The examination of the court cases reveal important findings that perhaps should alter the state's role in the family. The analysis reveals that although most parents are caring, loving and not deliberately out to inflict pain, some of them do not know how to act in their children's best interest. For example in some cases, parental actions resulted in exposure to harm. Interestingly in the majority of the cases, the parents believed that their actions were in their children's best interest. First, the parents tried alternatives, such as talking to the child, groundings and time outs and when these methods were not successful in controlling their children's defiant behaviour, physical punishment was resorted to. In numerous cases, parents regretted using force, but claimed they felt that they had no choice. Therefore, it appears that most parents want to act in their children's best interest, but do not always know how to. Due to this, it may be time for the state to provide more educational support and information to parents in regards to raising and disciplining children. For example, teaching parents strategies that are effective but do not place the child at risk. This in turn could alter the perception of what the state's role should be in the family.

Perhaps it is time to rethink what the state's role should be in the family. Presently, the liberal paradigm is endorsed within Canadian society. Under this view, it is perceived that the state should have minimum interference into family affairs, become involved only when parents neglect their obligations or expose their children to harm, and that parents will act in their children's best interest. Because the liberal paradigm is based on the assumption that parents act in their children's best interest, there is reason to question if such an approach should be abandoned. The findings from the analysis of the

court cases reveal that not all parents know how to act in their children's best interest.

Determining what role the state should play in the family is a difficult question to answer and this thesis does not offer suggestions. Before any recommendations can be offered, further research is needed, and it must be made clear that the findings presented in the thesis have limitations. Although the findings from the examination of the court cases reveal that most parents are loving, caring and want to act in their children's best interest, it is difficult to conclude that parents in general act this way. The research presented in this thesis is based on a small sample size of fifty court cases; therefore, it can only be speculated that parents want to act in the best interest of their children.

Also, an extensive examination of other approaches, such as Sweden's collectivist approach, is essential. Perhaps a collectivist approach would be more appropriate. It can be assumed that the collectivist approach recognizes that parents do not always know how to act in their children's best interest since the state provides extensive services to families, such as parenting courses.

Or maybe Canada should continue to endorse the liberal paradigm, but make some modification since it appears that most parents want to act in their children's best interest, but may need assistance sometimes in determining how to achieve such an objective.

Hence, the debate over corporal punishment is important. It draws upon the larger issue of what the state's role should be in the family. This is a complex question that requires further research.

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Correspondence

Joan Durrant, PhD, Family Studies, University of Manitoba, December 2003.

Laura Stevens, MSW, Health Canada, January 2004.

Roxanne Manning, Nova Scotia's Department of Community Services, March 2004.